THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 779/2018

In the matter between:

JOHANNES JACOBUS VENTER **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Venter v The State* (779/2018) [2021] ZASCA 21 (18 March 2021)

Coram: CACHALIA, MOCUMIE and MOLEMELA JJA and MABINDLA-BOQWANA and POYO-DLWATI AJJA

Heard: 18 August 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 have been at 12h00 on 18 March 2021.

Summary: Evidence – whether contradictions in the evidence of the complainant as a single witness and that of other witnesses in sexual offences were material – whether the evidence was properly assessed and whether despite contradictions the appellant was appropriately convicted.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Potterill and Maumela JJ and Van Niekerk AJ sitting as a court of appeal):

The appeal is dismissed.

JUDGMENT

Mabindla-Boqwana AJA (Mocumie and Molemela JJA and Poyo-Dlwati AJA concurring):

Introduction

[1] Rape is one of the most invasive and horrendous criminal acts. Added to that is the trauma that goes with a victim having to recount the ordeal in evidence. Refuting a view that it is easy to bring a charge of rape, in *S v Jackson,* Olivier JA[1] observed:

'Few things may be more difficult and humiliating for a woman than to cry rape: she is often, within certain communities, considered to have lost her credibility; she may be seen as unchaste and unworthy of respect; her community may turn its back on her; she has to undergo the most harrowing cross-examination in court, where the intimate details of the crime are traversed *ad nauseam*; she (but not the accused) may be required to reveal her previous sexual history; she may disqualify herself in the marriage market, and many husbands turn their backs on a "soiled" wife.'

[2] Olivier JA criticised the cautionary rule in relation to the evidence of complainants who are single witnesses in sexual offences as being premised on an

[1] *S v Jackson* 1998 (4) BCLR 424 (A); [1998] 2 All SA 267 (A) at 272-273.

outdated notion that unjustly stereotypes complainants (overwhelmingly women) as particularly unreliable. He, however, endorsed the view that evidence may call for a cautionary approach where, inter alia, a witness has been shown to have been unreliable, is shown to have lied, had previously made false complaints or bears some grudge against the accused. In those cases, some supporting material may be required.[2]

[3] More often than not, in sexual offences the State places reliance on the evidence of a single witness. Although there is no general requirement for corroboration, in the criminal context our courts have taken the approach that the evidence of a single witness should only be relied upon where it is clear and satisfactory in all material respects.[3] This position is supported by s 208 of the Criminal Procedure Act 51 of 1977 (the CPA), which provides that the conviction of an accused may follow from the single evidence of any competent witness. Even so, the overarching consideration in a criminal matter is whether the State has proven its case against the accused beyond a reasonable doubt.[4]

[4] 'It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true, but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true'.[5] The approach to the evaluation of evidence in a criminal trial was articulated by this Court in *S v Chabalala*[6] as follows:

---

[2] *S v Jackson* fn 1 at 274.
[3] *Zulu v The State* [2019] ZASCA 189 para 21.
[4] *Y v S* [2020] ZASCA 42 paras 71-72.
[5] *S v V* 2000 (1) SACR 453 (SCA) para 3.
[6] *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.

'The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an *ex post facto* determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence.'

[5] As was stated by Malan JA in *R v Mlambo*[7] 'there is no obligation upon the [State] to close every avenue of escape which may be said to be open to an accused. It is sufficient for the [State] to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused'.

[6] In this case the appellant, Mr Johannes Jacobus Venter, was convicted in the regional court, Pretoria on four counts of rape and seven counts of indecent assault committed during the period of August 1998 and June 2002. He was sentenced to an effective term of 10 years' imprisonment. He appealed against his conviction to the Gauteng Division of the High Court, Pretoria (high court) which appeal was unsuccessful (Potterill and Maumela JJ (concurring) and Van Niekerk AJ (dissenting)). The appeal against his conviction is before us with special leave having been granted by this Court.

[7] *R v Mlambo* [1957] 4 All SA 326 (A); 1957 (4) SA 727 (A) at 738A-C. See also *S v Sauls and Others* [1981] 4 All SA 182 (A); 1981 (3) SA 172 (A) at 182G-H.

[7] The nub of the appellant's case is that the trial court did not properly assess the complainant's evidence intrinsically and as against the evidence of the other witnesses. Had it done so, so it was contended, it would have found material discrepancies which affected the credibility and reliability of her evidence. The evidence was lengthy, involving a total of 12 counts and 17 witnesses. The attacks on the evidence are numerous, it is accordingly important to outline the evidence in some detail before proceeding to consider whether there is merit in the appellant's contentions.

The complainant's evidence

[8] The complainant, a 42-year-old woman at the time, testified that during the period of August 1998 and June 2002 she encountered numerous incidents of rape and indecent assault (which she referred to as sexual harassment) at the hands of the appellant. At the time she was employed by Denel AMG (AMG), a business unit of Denel Personnel Solutions (DPS), which she joined in May 1998 as a personal assistant to the appellant who was the Chief Operating Officer. They supplied the South African Air Force (Air Force) with personnel and were stationed at their headquarters in Pretoria Central.

[9] In respect of count 1 (indecent assault) she testified that after three months of joining AMG, ie in August 1998, during working hours, the appellant asked her to bring documents into his office. Once she had entered his office, he closed the door behind her and grabbed and touched her around her waist. He then unbuttoned her trousers, inserted his hand inside her underwear and fondled her vagina, whilst standing behind her. She managed to pull herself away and asked him not to do it again. She then opened the door and stepped out of the office and went back to her desk. She did not report this incident to anyone for a number of reasons: (a) she was

afraid that nobody would believe her and she could lose her job; (b) no one would listen to her or assist her because she was new and she was working in a close-knit 'white Afrikaner' dominant environment where the appellant was well-known and respected; and (c) she would have been treated as an outcast in her Hindu community as according to their culture and religion and her husband would remove her three children from her or put her out of the house.

[10] The second incident (ie count 2, indecent assault) occurred between August and September 1998. In this instance the appellant called her again to his office but this time he told her that he wanted to give her a hug for all the good work she had done. She went into his office, but before she could say anything, the appellant grabbed her from behind and inserted his hand into her blouse and touched her breasts, inside her bra. She told him to stop a number of times but he instead simulated sexual movements on her buttocks asking: 'Why should we stop? What is the problem, is it not nice?' She again managed to pull away and return to her office. She wanted to report the incident but did not know to whom to turn as she was terrified.

[11] The incident relating to count 3 (rape) occurred between January and March 1999 when the appellant summoned her into his office one morning and instructed her to go with him to a suite situated at the Loftus Versfeld Stadium (Loftus) which belonged to DPS. He told her that he wanted her to see how the renovations were going there. She did not think it was necessary for her to go but it was an instruction, so she obliged. They drove to Loftus in the appellant's vehicle. The appellant drove straight to the premises and she noticed that there was no one there. When she enquired, the appellant told her that there should be people working in the suite. They took an elevator to the suite and upon their arrival there, the

appellant unlocked the door with a key he had. She noticed that the suite was empty. When she asked the appellant why nobody was there, he told her that the 'television guy' was supposed to be around and they should go inside and take a look. In the suite, she noticed two glasses and a bottle of wine on the counter from which he offered her a glass. She declined as she was a teetotaller on account of the medication she took for epilepsy. The appellant poured himself a glass of wine and drank it. He thereafter pushed her onto a wooden bench that had cushions on. She asked what he was doing and, without saying anything, he removed her underwear and forcefully inserted his penis into her vagina, which was very painful. She tried to push him away and to get up from underneath him but she did not succeed. He was a lot bigger in stature than her as she only weighed 45 kilograms. She never gave him consent to have sexual intercourse with her. When he had finished raping her, he drank another glass of wine and warned her not to tell anyone about the incident or else he would kill her with a shotgun. She believed him because he was an avid hunter of game. They left the suite; he locked the door and they went back to the office.

[12] At the office she telephoned the appellant's supervisor, Mr Wilhelm Langner who was based in Kempton Park and told him that she needed to talk to him because the appellant was 'sexually harassing' her. Mr Langner said he could not talk at that time and promised to call back but he never did. She did not tell Mr Langner that the appellant had raped her, she just used the words 'sexual harassment'. She could not tell him about the rape because she was scared of losing her job. She contacted him with the hope that he would talk to the appellant to get him to stop his actions.

[13] That afternoon she spent most of the time in the ladies' bathroom as she was nauseous and vomiting. She could not urinate properly. Her urine would burn

because her vagina was torn on the outer walls and she also felt cramps in her lower abdomen. She also could not walk up straight. As soon as she got home, she noticed that her vagina was swollen and there were little blood spots on her panty that emanated from the little cuts she sustained on her vagina. She decided to look at the injuries because she could not go to the gynaecologist as she would have to explain that she had been raped. She was scared that the gynaecologist would tell her husband who was a very strict person and stood by their cultural beliefs. The next day she phoned the chemist and just told them that she had an infection and described her symptoms and they prescribed a cream for her to use. She was terrified to let anyone know.

[14] In June 1999 (although she later said it was in December 1998) she went to see a psychologist by the name of Ms Trudie van der Westhuizen in Johannesburg. She did not want to consult with one in Pretoria as her children had been to some psychologists there regarding problems at home. Her visits to Ms van der Westhuizen were initially about her marital problems. Ms van der Westhuizen requested her to attend further sessions and she thus became her regular client. In December 1999 she broke down emotionally and finally mustered the courage to tell Ms van der Westhuizen about the sexual assault and rape at work. She could not take it anymore as she had become very depressed and had started taking anti-depressants for the first time in her life.

[15] To get some respite, she asked the recruitment agency that found her the job at AMG to find her employment opportunities elsewhere. A few days later a phone call from the recruitment agency was picked up by the appellant who told the agent not to call their offices again. This was followed by the appellant telling her that he would give her a bad reference and she would not get employment anywhere else.

[16] The sexual assault continued from March 1999 to December 1999 (count 4, indecent assault), where the appellant would use the same tactics of calling her into his office for documents then touching or stroking her breasts or vagina. As regards count 5 (indecent assault), in January 2000, after returning from leave and having realised that her divorce was finalised, the appellant continued sexually harassing her in the same manner as before, but this time more often. He would fondle her breasts or touch her private parts in his office.

[17] On one of the days in January 2000 (count 6, rape), the appellant asked her to work overtime as he needed to complete a presentation. All other employees had already knocked off. She went to his office and sat on a chair. The appellant got up and locked the door. When she asked what he was doing, he simply smiled and grabbed her hand. He pulled her up from the chair and started fondling her private parts, saying that he needed her to reach orgasm. His hand was inside her pants and on her underwear. At that time, she was wearing long pants with a pantyhose underneath. She protested all she could for him to stop and she tried to wiggle away from him. She also told him that she would scream but he reminded her that everyone had left and nobody was there. He pushed her to the side of the table and pulled off her pantyhose and underwear. She heard him loosen his belt and felt him placing his penis inside her vagina from behind. She continued to plead for him to stop but he ejaculated inside her and when he had finished, he wiped his penis with his handkerchief. She never consented to have sexual intercourse with him. He also told her that since she was not married anymore, she did not need to look elsewhere for sex as he was available. He then left her in the office. The next day she did not want to go to work. She hated going there but felt trapped as she needed the money and work to support herself and her three children. She always remembered the threats

that the appellant made to her, the most serious being that he would come after her and kill her.

[18] She then approached Mr Gerhardus van Staden, a colleague whose office was directly opposite the appellant's office, and requested him to stay at work when he saw that she needed to work overtime. Mr van Staden was a good friend of hers, whom she trusted. She did this to ensure that there would be somebody around if she screamed or if any noises came from the appellant's office. She did not tell Mr van Staden about the rape or the real reason she asked him to stay behind. She was emotional and embarrassed and only told him that the appellant touched her legs. Mr van Staden did not ask her questions, he just left it at that. Mr van Staden however never had to stay behind because she did not work overtime after the rape incident.

[19] At some stage after the January 2000 rape, she went to the Brooklyn Police Station to report the sexual abuse incidents, having been urged to do so by Ms van der Westhuizen on various occasions. There, she stood around for quite a while and was totally ignored by the police. She noted that the atmosphere was not welcoming and it did not make her feel comfortable. There were also no female police officers present, so she left.

[20] At some point she discovered that there was a course dealing with sexual harassment arranged by AMG which everyone had attended. She was the only one who did not go. When she asked the appellant about it, he told her that it was not necessary for her to go and did not give any reasons.

[21] From February to June 2000, the appellant went on hunting trips. In regard to count 7 (indecent assault), she testified that in or around July to August 2000, upon his return, the sexual assault continued in the same way as before. He would use the same tactics where he would call her to his office and grab her from behind and either fondle her breasts or private parts. He would sometimes put his fingers in her vagina. In September 2000, the complainant was admitted to Louis Pasteur Hospital for two weeks for depression and migraines caused by stress. She was booked off sick for a week and returned to work after that. Her weight had dropped to 39 kilograms. The appellant noticed that she was underweight, and the sexual assault stopped for a while.

[22] At the end of September to December 2000, in respect of count 8 (indecent assault), he again continued sexually assaulting her by pulling her and groping her breasts on top of her clothing, saying he wanted to feel if she was gaining weight so that she could be ready for him. She thought that if she remained underweight this may stop the sexual assault and rape and so she started eating less. Before they went on leave in December 2000, the appellant called her into his office and told her that since she was still underweight, he would wait until the following year.

[23] In respect of counts 9 (indecent assault), 10 (rape), 11 (rape) and 12 (rape) she testified that when they returned from leave in January 2001, the same form of sexual assault continued until June 2002, where he would call her to his office to bring documents and grab her from behind, touching her breasts and vagina. The fact that she was still underweight did not deter him. On two occasions during the period of January 2001 to June 2002, he attempted to force her to have oral sex with him by pressing her head down to his erect penis. She managed to close her mouth

and clench her teeth, so that he could not insert his penis into her mouth. When she refused, he pushed her to the side of his table and, without a condom, penetrated her vagina with his penis from behind. There was another occasion, in between the times he attempted to force her to have oral sex with him where he locked the door, fondled her private parts and forced her to the side of the table and placed his penis into her vagina from behind. All these were without her consent. The last incident was in June 2002.

[24] In August 2002, their office relocated to the Waterkloof Airforce Base (Waterkloof). There she continued to work for the appellant until he was suspended in 2004. Nothing happened between June 2002 and 2004. She was on gynaecological medication for recurring (monthly) vaginal infections since 2000. According to the gynaecologist, this was due to forced insertions into her vagina which caused quite severe tearing.

[25] The rape and indecent assault incidents were reported to the police on 20 August 2004. This was after the complainant had decided to report it to their new Chief Executive Officer, Ms Zodwa Dlamini. She had been told that Ms Dlamini was an open and fair person. She felt she could relate to her because Ms Dlamini was also a black woman to whom the complainant felt more comfortable to report the matter. Ms Dlamini arranged for Mr Julian Keyser, the head of security at Denel to take a statement from her, leading to the matter being reported to the police.

The appellant's evidence

[26] For his part, the appellant denied that he raped and indecently assaulted the complainant. He stated that they never worked overtime and further denied that he went with the complainant to the suite in Loftus during the period of January to

March 1999. He testified that he went there with her at 10h00 around the second week of May 1998 for her induction. This was done to introduce her to the environment so that if he or one of his five managers could not attend the suite for purposes of entertaining clients, the complainant would be expected to stand in. They went to Loftus in separate vehicles, because the complainant had informed him that her husband was a very jealous man who followed her around and that she was terrified of him. Generally, there were guards at the gate, and there were people who were cleaning and exercising at the stadium. Underneath the suite were doctors' consulting rooms. He denied that there was a bottle of wine and glasses on the counter of the suite as well as a wooden bench. He testified that what was there was an L-shaped corner bench built in stone. When they got to the suite, he showed the complainant where to stand to receive guests and explained the purpose of the rugby spectator box to her. He then took the complainant to Waterkloof to introduce her to the staff there, including Mr Marius van Coller. From Waterkloof they went back to their offices where they continued with their normal daily activities.

[27] He testified that he had problems with the complainant. She complained about her salary not being market-related. At some stage she applied for a loan which he did not approve because she did not qualify. He had talked to her about her lack of time keeping as she came to work late. He banned Mr van Staden from coming to her office, he barred her from selling items during office hours and admonished her for making private calls. The complainant was embarrassed and indignant about all this.

[28] He denied refusing the complainant an opportunity to go to a course dealing with 'sexual harassment' and stated that it was in the interest of all DPS employees to attend the course. He further denied threatening to shoot her if she complained

about what happened to her. At some stage, she complained to him about her husband assaulting her and showed him bruises sustained from an incident where her husband tried to run her over with a vehicle. Following this, he arranged for a social worker, Ms Trudie Lourens, to assist the complainant. He was never called by Mr Langner regarding him having been accused of sexually harassing the complainant; and it would not have been possible for him to rape or sexually harass her as there were security guards at their offices. He had a good working relationship with Mr Langner and respected him as his superior. The hunting trips they undertook together were business related. He had seen the complainant using alcohol at social events more than once. To avoid repetition, I shall deal with the other witnesses' testimony as well as crucial aspects of their cross-examination in my analysis of the evidence, as it becomes necessary.

The evaluation of the evidence

[29] It is trite that in the absence of an irregularity or misdirection, a court of appeal is bound by the credibility findings of the trial court, unless it is convinced that such findings are clearly incorrect.[8] The main attack on the credibility and reliability of the complainant's evidence is primarily on the differences between her evidence-in-chief and cross-examination in relation to the period in which the last incident occurred and whether the last incident was a rape or an act of indecent assault. It was contended that this discrepancy had a material bearing on the complainant's overall credibility in relation to all the charges.

The discrepancy as to the last incident

[30] In this regard, the contention is that the complainant changed her version in cross-examination by alleging that the last time she was sexually assaulted was in

[8] *S v Jackson* fn 1 at 271.

June 2001 as opposed to June 2002 to which she testified in-chief. She also changed her version by stating that she was not raped in June 2002 but that the appellant only fondled her breasts and touched her private parts. She later testified that she could not remember what happened in June 2002.

[31] When confronted about these discrepancies the complainant stated that the incidents occurred a long time ago and they were traumatic for her. Thus, she tended to get confused with the dates. She, however, maintained that the last incident was in June 2002 and that she had made a mistake with the dates. She also got confused about the sequence of the events. She further stated that (during her evidence-in-chief) she was able to tell the court what happened in 2002 because she took the events 'from the beginning and it was much easier to go from the start right up to the end'. This explanation is sensible in my view. It is well known that a witness in a criminal trial follows the questioning of either the prosecutor or the cross-examiner (defence counsel). The confusion may have also been compounded by the cross examiner (defence counsel) jumping from one piece of evidence to another. It appears from the record that the June 2001 date was introduced by the defence counsel in the following manner:

'Fine, what did you testify in the disciplinary hearing as to when you were *sexually harassed* by the accused last – June 2001.'(Emphasis added.)

[32] After the mix-up about the dates and the last incident she states the following towards the end of her cross-examination on this issue:

'Good. Now, why did you say you were sure of the date, you can remember it well, and then you tell us now it was June 2002. [Translated] -- *Because I thought he was referring to an incident in 2001*.' (Emphasis added.)

[33] Counsel for the appellant submitted that it was odd that the complainant would not remember the last incident as it would have been the most recent in her mind before she testified. Other than the fact that she testified about four years after the last incident occurred, if one has regard to the frequency of the incidents, the trauma she experienced and her general ability to recall events, it does not strike as strange that she would not recall which event occurred last between the rape and the more frequent indecent assaults. The complainant could not even recall the date (year) she got divorced (which is an event whose date should ordinarily stand out in one's mind). The contradictions in my view, given their context and the explanation tendered, do not suggest that the complainant was an untruthful or unreliable witness. While she mixed up the dates, she was certain of the fact that the incidents had happened and gave detailed accounts of those in relation to the period of January 2001 and June 2002.

[34] As explained by J Hopper and D Lisack:[9]

'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.'

[35] I note that the appellant was originally charged with five counts of rape, but was acquitted on count 12, which was the last count of rape. The trial court did not give reasons for this finding other than asserting that the State had not proven this charge beyond reasonable doubt. It can only be assumed that this was based on the

[9] J Hopper and D Lisak *Why Rape and Trauma Survivors have Fragmented and Incomplete Memories* Time Magazine (2014), which was cited with approval in the minority judgment of *Y v S* fn 4 para 90.

fact that the complainant could not recall whether the last incident was a rape or indecent assault. This is regrettable given the importance of giving reasons in criminal trials.

[36] Before this Court, a proposition was put to counsel for the State to the effect that if the trial court saw it fit not to convict the appellant on charge 12, which related to the period of January 2001 to June 2002, then all the charges relating to that period should have fallen. I am unable to agree with this proposition. The least that can be assumed is that the trial court acquitted the appellant on the last charge for lack of clarity as to what the last incident was, as already indicated. The complainant's confusion or discrepancy only related to the nature of the last incident and its date. It did not affect the entire period of January 2001 to June 2002. The acquittal on count 12 does not, in and of itself, mean that the evidence of the complainant was not credible. The confusion regarding the dates could have genuinely been caused by the traumatic experience the complainant encountered and was not necessarily an indication of untruthfulness.

[37] Unlike counts 9 to 11, which were alleged to have taken place during the period of January 2001 to June 2002 in the charge sheets, the date in count 12 was confined to June 2002. Although the complainant was confused about what the last incident was, her evidence was clear as to what incidents occurred between the period of January 2001 and June 2002. Consequently, the finding of not guilty in respect of count 12 did not render the complainant's evidence untruthful and unreliable in relation to the balance of charges for that period. It is important to bear in mind too that even falsity in one part of a witness' evidence is not necessarily an

indication of falsity in other aspects thereof. It does not necessarily destroy the credibility of a witness *in toto*.[10]

The discrepancy relating to the insertion of a finger

[38] A further submission in relation to the period of January 2001 to June 2002 was that the complainant testified in-chief that during that period, the appellant inserted his fingers into her vagina but in cross-examination she could not remember whether or not the appellant had done so. She again changed her version stating that he inserted his fingers and later stated this was a possibility.

[39] A closer examination of the complainant's evidence-in-chief on this aspect reveals that the prosecutor asked about the insertion of the finger in respect of different occasions. The first question related to whether on the occasions that the appellant attempted to force her to have oral sex with him, he 'inserted' his fingers inside her vagina. The complainant's answer was 'no'. When asked whether he had put his fingers on her private parts on other occasions of sexual assault, her answer was 'yes'. In cross-examination when asked whether the appellant inserted his finger into her vagina, she answered 'yes it was part of touching my vagina'. She was asked why she did not mention that in the first instance (in cross-examination) and her response was that she mentioned it in her evidence-in-chief. She further stated: 'Well touching my vagina and inserting it is the same thing. The fact is he did go to my vagina'. At another point, during cross-examination she stated that when his fingers were in her vagina, she was so emotional and traumatised, she could not remember what exactly he did. She also stated that 'when he had his fingers in my vagina he used to play, put his fingers in I was so traumatised or too emotional I just wanted

[10] *R v Gumede* 1949 (3) SA 749 (A) at 756 and *S v Mokonto* [1971] 2 All SA 530 (A); 1971 (2) SA 319 (A) at 322-323.

to get away . . . when he was sexually harassing me, to me at this stage it was not relevant whether he was inserting it in my vagina or not'.

[40] My impression is that the complainant's use of the words 'played', 'put' and 'insert' of his fingers in her vagina referred to the same thing. It seems to me the word 'insertion' was not meant as a form of penetration, but was broadly used with reference to touching, putting or fondling. Significantly, the appellant was not charged for penetrating her vagina with his finger, which would constitute rape. The issue of the 'possibility' of the insertion of a finger related to the question of whether fingers were inserted between January 2001 and June 2002. Her answer was that she was so traumatised that she could not put a date, a time or a year to when he inserted his fingers. I do not think that her lack of clarity as to whether or not fingers were inserted into her vagina during the period of January 2001 to June 2002 points to her lack of honesty. She was consistent that his fingers were in her vagina, whether he 'inserted', 'played with', 'put' or 'touched' her vagina should not lead to the rejection of her evidence for that period. Also, the charge sheet in respect of count 9 was framed broadly by the prosecution accommodating a number of complaints: that during the period of January 2001 to June 2002 indecent assault occurred by stroking her vagina and/or touching and/or inserting his fingers into her vagina as well as forcing her on two occasions to have oral sex with him by forcing her head down onto his penis. In my view, the evidence has lived up to count 9 and I therefore do not see why it cannot stand.

[41] Contrary to what my colleague states in the minority judgment, I hold the view that the charge sheet justifiably separated the three rapes that occurred during the period of January 2001 to June 2002 from the indecent assaults. Some of the indecent assaults listed in count 9 clearly took place during the rapes alleged in counts 10 and

12 (ie the rapes that involved the forced attempted oral sex incidents). Count 11 evidently is the count that is in-between the rapes where the attempted oral sex incidents were involved. Count 9 encompassed various incidents of indecent assault which occurred in the period of January 2001 to June 2002. I do not see anything irregular in separating the rape charges from the charges of indecent assault that occurred during the same period. I am of the view that the charges are clear and they are supported by the complainant's evidence for that period.

[42] Apart from testifying that the 'normal sexual harassment', involving the 'same tactics' continued for the period January 2001 to June 2002, the evidence led for that period was, inter alia, the following:

'Now you indicated that this was from January 2001 to June 2002 how many times did he have unprotected sex with you --- Three times.
Did anything happen in July 2002 or not?-- No, because he was busy preparing an office at our offices at the Waterkloof Air base.

Right, what I would like to establish is you referred to the sexual harassment continued during this period of time, January 2001 to June 2002. The same that you just indicated and twice that he had forced you to have oral sex. Now the three occasions of the unprotected sex that took place, can you remember if it is possible? Was it in-between the oral sex or was it before that, after that (inaudible)? -- The two was when I refused oral sex.

You refused?-- Yes, and then . . .
Is that when he had unprotected sex.-- Yes, yes.
Yes?-- And the other one was in-between.
In-between the two incidents of oral sex? –Yes.
Right. Can you remember the first incident when he forced you to have oral sex with him, can you remember that? -- The date no.
Not the date, can you remember the incident, what happened? -- Yes.

Tell the court about the incident, what you can remember about the incident the first time with the oral sex? As usual he would call me into his office, he grabbed me from behind and first… MECHANICAL INTERRUPTION
. . . me from behind and he first started fondling my private parts.
By fondling with your private parts, what did he do exactly with your private parts? -- He would play with my vagina with his fingers.
Did he at any stage insert his fingers in your private parts (inaudible) occasions? --No.
Put his fingers inside your vagina? -- No.
Right, on other occasions where he did not force you to have oral sex with him, did he any stage put his fingers in your private parts there?-- During the sexual harassment yes.
And that is still during January 2001 to June 2002? – That is correct.

You indicated that in-between the oral sex there was an incident where he had unprotected sex with you again is that right? -- That is correct.

Then you referred to a further incident, the second oral sex incident where he also had unprotected sex with you, is that right? – Yes.

Right, then the last incident that took place, when did that take place?
What month?-- It was just before we moved. June 2002.
June 2002. What happened then and where did it happen?-- That was the oral sex incident.
That was the last one, the last one. -- Yes.'

[43] There were clearly two incidents of forced attempted oral sex from what the complainant relayed in her evidence. The three incidents referred to by the complainant were that of rape. Two of which involved incidents of forced attempted oral sex.

[44] For the reasons mentioned above, I am of the view that the concession made by counsel for the State that counts 9 to 11 should have fallen away along with count 12, was improperly made. It follows that the aforesaid concession is of no consequence, as a court is not bound by counsel's erroneous concession.

This concession was lamentably unsubstantiated, hasty, and unjustified by counsel and offered very little assistance to the Court. The Court is left to make its own assessment of the evidence in relation to the charges.

The complainant's alleged testimony in disciplinary proceedings

[45] This brings me to the submission that the complainant testified in the disciplinary hearing held at Denel against the appellant that the last incident was in 2004 and gave the same instructions to her attorneys in a civil claim. The appellant seems to have relied heavily on the findings of the minority judgment of the high court in his arguments, not only on this aspect but in many others. My view is that the recounting of the evidence by the minority judge a quo was incorrect in a number of respects. As to the 2004 issue, the minority judgment found that the complainant could not recall whether the last date of the incident was 2002 or 2004. This is not correct. She did not testify as such, as it will be shown below. From my reading of the record, I could not see any inconsistency in her evidence, on this aspect, for which she was criticised. The appellant did not attend the disciplinary enquiry and the presider of the disciplinary hearing was not called as a witness. How is the complainant expected to account for a date appearing in the ruling when the record of the enquiry was not available to verify that she had allegedly lied in her evidence when she emphatically denied the 2004 date?

[46] This question was put to her in cross-examination along with the suggestion that she instructed her attorney, Mr Ashook Kirpal that the last incident was in 2004, as that was alleged in the particulars of claim. The complainant categorically denied that she gave that testimony in the disciplinary hearing. The transcripts of that hearing could not be found after an opportunity was given to the appellant's counsel to locate them. Her version could therefore not be controverted and there is no reason

not to accept it. She further denied instructing her attorney that the last incident occurred in 2004 and stated that she had never even seen the summons.

[47] Mr Kirpal, who was the initiator of the complaint on behalf of Denel in the disciplinary hearing, was called as a witness. He testified that the charge sheet mistakenly referred to the incidents having occurred between the period of August 1998 to June 2004. He amended the charge sheet to reflect the correct period. He did not know why the presider of the disciplinary hearing referred to 2004 in the 'disciplinary findings'. He testified that the appellant was suspended in 2004 and there was an unrelated charge of misconduct that he committed in 2004. On this score, Mr Kirpal's evidence was clear.

[48] As to the particulars of claim reflecting the year 2004, he testified that the particulars of claim were amended but he refused to submit them at the trial. It transpired that they were not actually filed. Mr Kirpal's performance as a witness on this aspect was less than satisfactory. That, however, does not take away from the complainant's evidence which was clear and unequivocal that she did not give the attorneys such an instruction.

[49] Her version is fortified by the fact that other than the alleged discrepancy, no evidence pointed to the fact that the last incident could have occurred in June 2004. Events that occurred in 2004 included the matter being reported to Ms Dlamini, the suspension of the appellant in June 2004, the reporting of the matter to the police in August 2004 and the appellant's disciplinary hearing in November 2004. In the absence of any controverting evidence, it must be accepted that any reference to 2004 as the year in which the last incident occurred was a mistake which could not, on available evidence, be attributed to the complainant.

Inconsistencies regarding the complainant's explanations for not reporting the alleged sexual offences

[50] It was contended that the complainant gave inconsistent explanations as to why she did not report the alleged sexual abuses. These are not inconsistencies at all, in my view. The reasons she gave are all equally plausible and could all exist at the same time. They relate to different questions and situations and are all encompassing.

[51] Her fear of the appellant and of losing her job are justifications which are both sensible. It is undisputed that there were hardly any black staff members at her place of work and her immediate supervisor was the appellant who was in charge and well- respected in their work environment. Her perception of the power-dynamics must be seen against that light. It was confirmed by the appellant and Mr van Staden that the appellant owned a rifle. Her fears following the threats which she said he made, were not unfounded. Professor Glydina Spies testified to the difficulties that victims of sexual abuse are confronted with, including powerlessness, fear and the lack of trust for others. She stated that '[v]ictims like [the complainant] can become so stuck during the process of the abuse that they have no other choice [but] to accommodate the abuse and lose through that, their right to make decisions'. (Translated.)

[52] As regards her culture, Dr Rajgopal Kolapan, a Hindu scholar, testified that if the complainant were to report the rape and sexual assault to her community, it was extremely likely that no one would believe her. Her family and community would blame it all on her, people would start withdrawing from her family and her husband, and her extended family would not associate with her. She would effectively be ostracised by her community.

[53] In *Van Zijl v Hoogenhout*,[11] Heher JA made the following remarks:

'Many sexual abuse victims experience considerable guilt and shame as a result of their abuse. The guilt and shame seem logically associated with the dynamic of stigmatisation, since they are a response to being blamed and encountering negative reactions from others regarding the abuse. Low self-esteem is another part of the pattern, as the victim concludes from the negative attitudes toward abuse victims that they are "spoiled merchandise". Stigmatisation also results in a sense of being different based on the (incorrect) belief that no one else has had such an experience and that others would reject a person who had.'

Although these views were made in relation to child victims, they are equally relevant in this case, given the power dynamics between the appellant and the complainant. There is accordingly no merit in this criticism, in my view.

The complainant's alleged signing of a medical questionnaire

[54] Counsel for the appellant referred to a medical questionnaire dated 19 April 1998, which the complainant allegedly signed when she applied for a job at Denel. It was submitted that in this form she stated that she was in 'excellent health', which was not true. Due to this, the appellant contended that because of the lie in the form, her evidence could not be believed. The complainant disputed that she signed the form. Her evidence was that she always put a line below her signature which was absent from this form. The issue of the disputed signature is also relevant in respect of another disputed form, the attendance register relating to the Introduction to Labour Relations course dated 8 July 1999, where 'sexual harassment' was apparently discussed as one of the topics, which the complainant said she did not attend. I shall return to this attendance register later.

[11] *Van Zijl v Hoogenhout* [2004] 4 All SA 427 (SCA); 2005 (2) SA 93 (SCA) para 11. Quoted from: D Finkelhor and A Browne 'The Traumatic Impact of Child Sexual Abuse: A Conceptualisation' (1985) 55(4) *American Journal of Orthopsychiatry* at 530. See also *S v Jackson* fn 1 at 272-273.

[55] Ms Annette Button, who was called as a witness on behalf of the appellant, testified that she was the only one with access to the personnel files. It was accordingly argued that it was highly improbable that someone else would have signed the medical questionnaire. Handwriting experts were called on behalf of both parties. Mr Cloete for the appellant testified that the handwriting characteristics were similar between the signatures on the disputed documents and those in the specimen and differences were minor. He concluded that there could not have been any forgery of the disputed documents. The State's expert witness, Mr Esterhuizen, on the other hand found differences which he thought were significant. He also found some similarities. He believed that Mr Cloete was not objective enough in his findings. The conclusion Mr Esterhuizen reached after taking all aspects into consideration was that the result was inconclusive. His view was that if Mr Cloete had taken those features into consideration, he could not have reached a definitive finding.

[56] In the end it could not be conclusively stated that the complainant was untruthful when disputing the signatures on those disputed documents. It is further doubtful whether a medical form which the complainant allegedly signed in April 1998 could discredit her for the rest of her life. It was not established, in my view, how that form could discredit her as a witness in 2006/2007 when she gave evidence.

The complainant's alleged signing of the register of the labour relations course

[57] A further issue as regards the attendance register in 1999, is that the complainant's evidence that she did not attend the course was supported by Ms Mariaan Grobbelaar who testified that she was surprised when she noticed that the complainant, as the executive secretary, was not at the course. Ms Salome Pienaar, whom counsel for the appellant had put to the complainant, would testify that she saw the complainant at the course, was not called as witness

on behalf of the appellant. While the complainant initially agreed that the signature on the attendance register was hers, on a closer look she realised that it was different from hers which led to the calling of the handwriting experts. Her credibility on this aspect has thus not been impaired.

Discrepancies relating to the Loftus visit

[58] As regards this incident, it was submitted that the complainant's evidence was inconsistent with that of other witnesses in a number of respects. Firstly, that all other witnesses stated that the visit to Loftus occurred in 1998 and the complainant was the only one who said she and the appellant went to Loftus in 1999. On this aspect, sight cannot be lost of the fact that the 1998 date is based on the fact that the appellant and his witnesses testified that the visit to Loftus was during the induction of the complainant in May 1998 (the appellant having first said it was in August 1998). The complainant on the other hand testified that the visit, as instructed by the appellant, was to see how the renovations were going (which was not during her induction but months thereafter). Mr van Staden testified that the complainant mentioned to him that the appellant had asked her to accompany him to Loftus.

[59] The contention that Mr van Staden also testified that the appellant and the complainant went to Loftus in 1998 is not correct. Reference to 1998 by Mr van Staden was in relation to the first time the complainant and appellant had left the office together which was when they went to Waterkloof using the complainant's vehicle. In relation to this instance, his evidence went as follows:

'Was there any stage you had knowledge of, whether personal, whether what Mrs [D . . .] shared with you, that they visited a place together? Let us talk about the first time that something like that took place. --- The very first time the accused was looking for the complainant to take him to the AMG offices at the Air Force Base Waterkloof.

. . .

Both parties left the building simultaneously.

. . .

Right let me ask you this. Can you remember whether they were driving together or in separate cars or... --- No, they were definitely driving in the complainant's car, because the accused car was not available at that stage.' (Translated.)

[60] About two weeks later, the complainant told Mr van Staden that the appellant had touched her leg in the vehicle. On a separate occasion in February/March 1999, (a date which is consistent with the period stated by the complainant), Mr van Staden testified that he observed the appellant and the complainant leaving the office together for Loftus. He could not remember whether they went there in separate vehicles. His evidence in regard to this trip was:

'Right. Then what happened thereafter in February/March 199[9], what happened then? --- During February/March the accused invited the complainant to accompany him to the box at Loftus Versfeld. (Translated.)

. . .

Again I saw them leaving the building . . .

Can you remember in which car they were driving, both cars or can't you remember the detail?-- That detail I can't remember or whether they went in separate cars.' (Translated.)

[61] There are a number of reasons why the appellant's induction version is highly improbable. Firstly, the appellant was at pains to demonstrate that the complainant was merely a secretary and not his personal assistant. This is despite the complainant's letter of appointment reflecting her as a personal assistant. According to the appellant, had she been a personal assistant she would not have been required to attend to the suite as customer relations would not have been part of her job description. Secondly, he testified that he would only have required her to go to the suite if none of his five managers were available to entertain clients. In the six years she had worked for him that did not happen. She was never required to attend the

suite for the purposes of entertaining clients. He however opted to take her on the second week of her employment and ‘induct’ her in an empty suite, about something that would rarely require her involvement. He further conceded that after taking her to Loftus, he did not remember her visiting it again, even leisurely as she disliked rugby.

[62] The reason for driving to Loftus in two vehicles does not bear scrutiny either. The complainant had just joined AMG. To share her marital problems with her immediate boss whom she barely knew does not strike as likely. According to the complainant, it was only shortly before her divorce (in 1999) and upon the appellant noticing bruises on her arms that she told him about her husband assaulting and almost running her over with his vehicle. Furthermore, it was only after she left her husband that he became jealous of her and that was a few years after she joined AMG. Looking at how difficult it was for the complainant to share her intimate details, according to her evidence and that of Ms van der Westhuizen, it was highly unlikely that she would have comfortably shared details about her husband’s behaviour on the second week of her employment with her new employer. Even the assault by her husband, which she had told the appellant about, was shared a few years into her employment, after the appellant had noticed bruises on her arms and inquired about them.

[63] It was submitted that after the complainant and the appellant had been to Loftus, they went to the head office in Waterkloof, where the appellant introduced the complainant to Mr van Coller and other personnel. Mr van Coller testified that when the complainant and the appellant arrived there, the complainant was in a friendly mood and he did not observe anything wrong with her behaviour. The appellant submitted that this evidence was not contested by the State but

acknowledged that the complainant denied that they went to Mr van Coller's office or to Waterkloof after a visit to Loftus.

[64] It is incorrect to say that Mr van Coller's testimony was not contested by the State. The complainant denied that they went to Waterkloof after Loftus. Her evidence was that she was raped between January and March 1999 at Loftus (long after she had joined AMG not during her induction) as already stated. Secondly, the complainant stated that they went to Loftus for a different reason which was to show her the renovations and thereafter went straight back to the office.

[65] Mr van Coller curiously remembered in precise terms being told by the appellant that they were from Loftus, and the colours of the vehicles the appellant and the complainant drove in May 1998, in particular that of the complainant whom he was seeing for the first time. Mr van Coller was asked why he remembered that they came to see him in mid-May 1998. His response was that, that was when the complainant was employed and the appellant always introduced his secretaries there. One wonders if his recollection was truly independent.

[66] It was further contended that the high court erred in finding that it was not put to the complainant in cross-examination that the complainant and the appellant went to Mr van Coller's office at Waterkloof after they came back from Loftus. This statement was put in general terms to the complainant. The only thing she was told in cross-examination was that they went to Waterkloof:

'Further, ma'am, with regard to the visit at the box, is it so that after you were at the box, you went to Waterkloof base? (Translated) --- No I testified that we went back to our offices at the headquarters at the Air Force.'

[67] The other important details were that she was taken to Mr van Coller and his staff to be introduced and most importantly, Mr van Coller's observations that she was very friendly and pleasant were not put to her.

[68] It was also raised on behalf of the appellant that Mr van Staden had testified that when the complainant returned from Loftus, he asked her what she observed at the suite and she only remarked '[p]retty'. She also did not report the alleged injuries to her vagina to any medical doctor or to anyone else. Mr van Staden testified that he saw the complainant again only the following day, and not on the same day as the minority high court judgment erroneously found. After remarking about the suite being pretty (the following day), she immediately changed the subject and the suite issue was never raised again. Mr van Staden did not notice anything untoward then but in the course of time, he observed that something was wrong but they never spoke about it. He personally attributed it to a very serious motor vehicle accident that the complainant was involved in. He noticed that her mood gradually worsened, she became depressed and started developing a fear of the appellant. She was extremely tense, was constantly on medication and suffered from weight loss. He accompanied her to the doctor and psychologist. When he tried to establish what was going on, she simply said 'pressures of life'.

[69] Mr van Staden's observations about the deterioration of the complainant's health after the Loftus trip coincide with her evidence that she became very depressed after the Loftus incident and was put on anti-depressants. In December of that year she mustered up the courage to tell her therapist, Ms van der Westhuizen, about the sexual abuse she encountered from the appellant. While she also had marital problems, which contributed to her deteriorating health, Ms van der Westhuizen specifically testified that while the complainant had been telling her

about her family problems, she noticed there was something she was hiding and urged her to talk about it. That is when the complainant broke down and told her that she was sexually abused at work.

[70] An issue was also taken with the averment by Mr van Staden that he was told by the complainant a week before that the appellant had asked her to go to Loftus with him, while she testified that she told Mr van Staden on the morning she went there. This takes us nowhere, as a trip to Loftus is not disputed. It is not clear how this discrepancy discredits her evidence.

[71] Mr Langner denied that he received a call from the complainant, telling him about the appellant sexually harassing her. The trial court rejected his evidence on the basis that Mr Langner and the appellant had a close relationship. Evidence was led that Mr Langner and the appellant went on hunting trips together and visited each other's homes, the appellant's wife worked for Mr Langner and both Mr Langner and the appellant were suspended by Denel in 2004 along with Mr van Coller. According to the trial court it was not surprising that Mr Langner would protect the appellant. I accept that it is not enough for a court to reject the witnesses' evidence on the basis that they shared a close relationship with each other, while a motive may exist to protect a 'friend'. While there is a discrepancy between the evidence of Mr Langner and that of the complainant as regards the phone call, it is in my view, not of such materiality as to reduce the quality of her evidence in relation to the actual occurrence of the rape at Loftus.

[72] Mr van Coller's evidence similarly does not diminish the value of the complainant's evidence as to whether she was raped on that day. It is common cause that she was taken to an empty suite at Loftus by the appellant (the appellant

confirmed there were no people working in the suite); and as I have already indicated, the reasons proffered for taking her there made no sense and there is no reason why they could not be rejected as not being reasonably possibly true.

The complainant's failure to report the alleged rape and other sexual abuse

[73] A further question was raised as to why the complainant would only report the sexual assault to Mr Langner instead of the rape which she had just experienced. Furthermore, calling Mr Langner contradicted the evidence that the complainant was afraid of white men. The complainant testified that when she phoned Mr Langner, he told her he could not talk at that moment, but would return her call. According to her, if he had returned her call, as promised, she would have told him about the rape. As the high court remarked in the majority judgment at para 41 '[i]t does not take much logic that rape is a big step up from sexual [harassment] . . .'. It is not inconsistent that the complainant called Mr Langner, she testified that she was scared but she took a chance hoping that Mr Langner would talk to the appellant and the sexual assault would stop. She then heard of a similar complaint that was laid by the appellant's previous personal assistant to Mr Langner who did nothing about it. The said personal assistant was forced to resign. Based on this information, she did not contact Mr Langner any further.

[74] The complainant explained why she would not report the rape incident to Mr van Staden. She stated that although Mr van Staden was a good friend, she did not trust anyone and the matter was embarrassing. Mr van Staden testified that he understood why she would not discuss sexual matters with him as a man. It was contended that if she had discussed her marital problems with him, it made no sense for her not to tell him about the rapes. At no point did Mr van Staden testify about her telling him about the sexual abuse she encountered from her husband, as counsel

for the appellant seemed to suggest. Undoubtedly, talking about sexual matters is a step up to discussing general family problems.

[75] The complainant further explained why she never reported the rapes to her family doctor, Dr van Schalkwyk. He was also the appellant's and his wife's doctor. This was confirmed by Dr van Schalkwyk who testified that it was possible that the complainant would not tell him about the rape because he was known to both parties and, as a white doctor who worked in an Indian community, he had observed that women in that community would never come to him with gynaecological problems. The complainant further stated that she was weary of going to a gynaecologist after the Loftus incident because she feared that news of the rape would reach her husband. Whether or not her fears were founded, should be assessed based on her circumstances. This is something that was missed by the minority judgment of the high court, when criticising the complainant's failure to report the matter. Whether or not she could have consulted a gynaecologist further away from her location is something that was not explored with her in cross-examination.

[76] The complainant was also criticised for not reporting the matter to the security guards at Loftus. Even if the security guards were there, which she denied, it is strange to suggest that she should have reported to them if she, for reasons she explained, could not do so at her workplace and elsewhere. This criticism is also based on the conclusion that the complainant was bleeding after the rape on her. To the extent that this meant that she bled profusely after the rape, that impression is incorrect. She testified that she noticed little blood spots on her panty at home caused by small cuts on the outer walls of her vagina.

[77] As regards reporting to the police, the complainant testified that the appellant had a good relationship with generals and colonels in the army. The police force in the area was dominated by white men and she did not trust the police. When she went to Brooklyn Police Station to report the sexual abuse, the environment was not welcoming for her to report the sexual abuse and so she left.

Discrepancies between the evidence of the complainant and her therapist

[78] A broad contention was made in the appellant's written argument without giving any specifics as to the respects in which the complainant's evidence differed from Ms van der Westhuizen's. The same general findings are contained in the high court's minority judgment. Having examined the evidence of both witnesses in relation to their interaction and consultation, I find no material contradictions between them. The contra-distinctions between Ms van der Westhuizen's testimony and her written statement were reasonably explained by her.

[79] Ms van der Westhuizen testified that she practised as a therapist and the complainant went to see her for the first time in December 1998 until mid-2002 when she left her business. The complainant was her frequent client who consulted her on a weekly basis or telephonically, when necessary. It was initially difficult for her to uncover why the complainant had come to see her as she struggled to talk about her issues. The complainant initially spoke about her marital problems and was troubled by her children. She confronted her about something she was hiding because every time she saw her, she was thinner and more anxious. It was when she became a bit harsh with her that the complainant burst out in tears and told her about the sexual abuse at work.

[80] Ms van der Westhuizen relayed in detail the incidents of sexual assault and rapes which were told to her by the complainant. These were consistent with the complainant's testimony in material respects but for the discrepancies which, in my view, were not significant. The complainant initially testified that she first consulted with Ms van der Westhuizen in June 1999, but later corrected herself stating it was in December 1998. There was an issue as to whether the sexual abuse was disclosed in June 1999 or in December 1999 to Ms van der Westhuizen. Notwithstanding these, the complainant and Ms van der Westhuizen were consistent on one thing, that she told Ms van der Westhuizen long after consulting with her about the sexual abuse at work and with great difficulty. The time it took for the complainant to report the matter to Ms van der Westhuizen is consistent with her asserted general behaviour of finding it difficult to report the sexual abuse. Ms van der Westhuizen testified that the appellant 'sat' on top of the complainant during the rape incident at Loftus whilst the complainant made no mention of that. Ms van der Westhuizen accepted that the complainant did not say anything about 'sitting' but stated that she assumed that the appellant was in a sitting (front) position when he pushed her onto the couch at Loftus. The complainant confirmed that the rape at Loftus was from the front.

[81] The main discrepancies pointed out related to the written statements made by Ms van der Westhuizen. She made one statement in October 2004 and another in 2007. She explained that when she made a second statement in 2007, she was no longer in Johannesburg and had given all her documentation to Mr Keyser for investigation. She was unhappy that she had to make a second statement and had to remember things 'off the cuff' and did not have dates. They tried to see if they could retrieve any of her material from the computer of her erstwhile business partner but

were unsuccessful. The second statement was taken in great haste with her standing along the road in Nelspruit where she drove to meet up with the police.

[82] In her 2004 statement she mentioned that 'in 1998 [the complainant] came to us for trauma counselling due to the fact that she was being sexually harassed by a certain Koos Venter at work'. In the same statement, she later stated that '[i]t was approximately one year later from the date of her first visit that she had progressed to the point where she could reveal the fact that she had been raped'. There is no material discrepancy on this issue.

[83] In Ms van der Westhuizen's evidence-in-chief, she explained that she made a mistake when she mentioned in her second statement that the complainant was raped both from the front and from behind at Loftus. The complainant was only raped from the front. She testified that she meant to refer to all the rapes. She also muddled up the incidents but corrected herself that the rape in Loftus was from the front and the rapes at the office were from behind, and all vaginally. When asked why the details she testified about were missing from her statement, she stated that she did not know she could put those details on paper and she was uncomfortable to tell two male police officers about breasts and touching vaginally. She tried to put it in a way that they would understand. Crucially at the end of that statement is the inscription that she did not wish to put any further information down on paper because of her promise of confidentiality to the complainant and that she was willing to testify under oath. Close scrutiny of the record reveals that Ms van der Westhuizen's evidence was consistent with that of the complainant in material respects in how the incident occurred, as reported to her by the complainant. She adequately explained the discrepancies appearing in her written statement.

Discrepancies between the evidence of the complainant and Mr van Staden

[84] There is a discrepancy between the complainant's and Mr van Staden's evidence regarding whether he stayed behind at work after he was asked to do so by the complainant if asked by the appellant to work overtime. The complainant stated that she was never again asked by the appellant to work overtime after the one occasion when she was raped. Accordingly, Mr van Staden never had to stay behind. Mr van Staden on the other hand testified that he worked overtime about six to seven times in 1999 and about four times between 2000 and 2002 and the overtime was not more than 30 minutes after knock-off time. There is a clear contradiction between the witnesses on this issue but it cannot and should not lead to the total rejection of the evidence, in my view. The witnesses are ad idem on one crucial issue which is that the complainant asked Mr van Staden to stay behind because of the appellant's actions, although according to the complainant she never had to work overtime after the one occasion when she was raped. Other discrepancies raised are, in my view, not material as to vitiate the complainant's credibility.

Alleged improbabilities

[85] It was submitted that the appellant was not responsible for the complainant's medical condition, she was treated for the same medical condition before the alleged sexual abuse and was sexually abused by her husband. Dr van Schalkwyk testified that while the depression could be as a result of the vehicle accident the complainant was involved in; he did not rule out other reasons. Dr van Schalkwyk did not testify to the details of the psychological issues the complainant suffered from. He was her general family doctor, not her psychologist. The person that the complainant eventually opened up to was Ms van der Westhuizen, after being pushed by her to do so, and approximately a year after consulting with the complainant did she open up. Ms van der Westhuizen, a trained therapist could see that something was

bothering the complainant. Whilst abuse by the husband was acknowledged and reported, the secret that bothered the complainant, which she struggled to talk about, was the abuse she experienced at her workplace (the incidents of rape and indecent assault). It is important to also state that the details of sexual abuse she experienced at the hands of her husband were not raised in any detail during Ms van der Westhuizen's cross-examination. The only exchange counsel referred us to on this aspect went as follows:

'She could no longer be intimate with her husband? --- She was intimate with him but it was difficult for her.

Was she apathetic? --- No, it was rough sex.

It was rough sex --- It was.' (Translated.)

[86] Ms van der Westhuizen's evidence strengthens the complainant's version and the probabilities that the events as relayed by the complainant occurred, as she had told them to a therapist, in 1999 already, up to 2002. Based on Ms van der Westhuizen's evidence that she was told about the events from 1999, the complainant's version could not have been trumped up in 2004 when a case was opened against the appellant. The complainant gave a detailed account of the incidents. There were various inconsistencies particularly with regard to the dates, but, in my assessment, viewed carefully and holistically, her evidence was reliable. She provided reasons for not reporting promptly and the plausibility of her reasons were supported by the experts. These reasons are not unusual in sexual offence cases.[12] The appellant himself struggled recalling dates in certain instances. Ms van der Westhuizen had recorded the details of rape and sexual assault reported

[12] See also *S v Cornick and Another* [2007] ZASCA 14; [2007] 2 All SA 447 (SCA); 2007 (2) SACR 115 (SCA) the delay in reporting a rape was not considered to have any bearing on a complainant's credibility, albeit a child offender. See also *Mocumi v The State* [2015] ZASCA 201 para 24.

to her by the complainant since December 1999, but stated that her documents were taken by the investigating officer, Mr Keyser and never returned.

[87] There was no suggestion that the complainant colluded with Ms van der Westhuizen. There is no reason why Ms van der Westhuizen would give false evidence in support of the complainant. It is crucial that the first written statement made by Ms van der Westhuizen was in October 2004, long before she testified and it recorded the report of the sexual assault and rape of the complainant by the appellant. Ms van der Westhuizen had moved to Nelspruit having thought the matter was long resolved. She felt inconvenienced by having to make another statement and recalling events which occurred many years ago.

[88] While many of the incidents took place during office hours, they occurred behind closed doors. There is evidence of the appellant closing or locking the door. One incident of rape occurred after office hours when no one else was in the office. It is an overstatement to say the incidents occurred 'while there were other personnel present'. Other than Mr van Staden, it is not clear which other personnel occupied offices close to the appellant's office. Furthermore, the appellant was the executive manager, there is no evidence as to the accessibility of his office. The appellant conceded in cross examination that his office was sometimes closed when the complainant was there because they discussed confidential matters. He confirmed that it was customary for the complainant to bring documents to his office for his signature. He further confirmed that the complainant brought documents in August 1998 but did not remember whether the door was closed or open at that time. Crucially he was asked:

'Ja as die deur toe was? –Wel die moontlikheid bestaan as die klaagster so getuig dit het so gebeur dan is dit wat sy getuig het voor.

En dal sal niemand dit gesien het nie?—Wel as die deur toe is dan kan niemand dit sien nie.'[13]

[89] Consequently, the complainant's troubled marriage and her fragility as a person, which were raised as factors that caused her depression, do not make sexual abuse by the appellant less probable. That is so, even if she were to have been sexually abused by her husband.

[90] When viewed with other evidence, the trial court rightly rejected the appellant's version as not being reasonably possibly true. Apart from offering some explanation as to the Loftus trip, the appellant gave a bare denial. I am satisfied that having weighed the strengths and weaknesses of the evidence on both sides, the State has proven its case beyond reasonable doubt. I agree that there is no obligation on the appellant to provide any motives as to why the complainant would falsely implicate him. However, to the extent relevant, the reasons he offered make no sense. Even if there were problems to the extent painted by the appellant between the complainant and himself, it seems to me she had more to lose as a lower ranking staffer and woman of the Hindu faith than to lay charges of this nature against a powerful executive and expose herself to the humiliation and trauma of a rape trial. She stood to be rejected by her community and family than realise any gain.

Discrepancy regarding only one incident between August and December 1998

[91] The appellant alleges that the complainant testified that during the period of August to December 1998 she was actually sexually abused only once, although the appellant was charged for two offences covering that period. She later changed her version and testified that she was sexually assaulted twice.

---

[13] Translated from Afrikaans:
'Yes, if the door was closed? - Well, the possibility exists that if the complainant testified that it happened then it is what she testified before.
Then no one would have seen that? -Well, if the door is closed, then no one can see. . . .'

In her examination-in-chief, the complainant's evidence was that the sexual assault occurred twice during that period. During cross-examination the defence counsel put the following to her:

'Ma'am I asked questions of you yesterday about the first incident. We now get to the second incident. *It is Charge 2.* Could you please tell the honourable court when this event took place the second time that you were allegedly sexually harassed or indecently assaulted --Between August 1998 and December 1998.

. . .

How many times did an event occur in that time? -- Once.

Where was this? – Our offices.

. . .

And please tell the honourable court what happened on that occasion --- Mr Venter called me into his office and said he wanted to give me a hug for all the good work that I was doing.' (Translated.) (Emphasis added.)

[92] It is clear from this exchange that her reference to an event occurring once during the period was in relation to the second count as put to her by counsel and not the entire period. There is no doubt in her evidence that she was sexually assaulted twice during that period.

Conclusion

[93] Having assessed the totality of the evidence, I am of the view that the appellant was correctly convicted on all the charges. I am satisfied that the evidence accounts for all the charges. The appellant's grounds of appeal and argument did not reveal any incongruities that ought to have been considered by this Court in respect of each count. Whilst the magistrate can be criticised for not having given sufficient reasons in respect of each charge, the conclusions that he arrived at, as borne out by the record, were correct.

[94] The issue of the vagueness of the charges and their lack of particularity that my colleague raises in the minority judgment was not raised by the appellant as a ground of appeal nor did it enjoy any prominence during oral argument before us. It was neither brought up as an issue in the trial court nor was it raised in the high court. At the commencement of the trial, the appellant who was represented by the same counsel who appeared before us showed no difficulty in pleading. In fact, his counsel proceeded as follows:

'Your [Worship], I can only say I have worked through all these charges with my client, he is completely informed about the contents of all these charges. I don't even think it will be necessary to read them aloud to him. We can in the case of each charge simply ask him how he pleads against it.' (Translated.)

[95] During the course of the trial the appellant proceeded to give a version in respect of one count and offered a bare denial in respect of others. Nevertheless, the charges referred against the appellant were clear and unambiguous in my view. Given the nature of the offences, reference to months and years in the charge sheets as the periods in which the alleged incidents occurred as opposed to precise times and dates did not prejudice the appellant.[14]

[96] Similarly, the issue of the trial court's failure to deal with the evidence on each count, was also not raised as a ground of appeal. The appellant did not complain, as appears in the notices of appeal both before the high court and this Court, that his constitutional right to a fair trial was violated for this reason. Nor did he protest that

[14] According to A Kruger *Hiemstra's Criminal Procedure* (Electronic version 2020) at 14-10: 'The significance of the omission of the time of the offence depends on the extent to which time is essential to the charge. Where the charge was evasion of tax, the mention of time periods was regarded as essential (*R v Toiling* 1994 OPD 132, *R v Matswele* 1940 TPD 345). Time is an essential ingredient if the act is not an offence unless it occurred at a certain time, as would be the case of hunting at night with a lamp. At first blush the provision appears to be in conflict with section 84 which requires that the charge must mention the time at which the offence was committed. This provision means that even when section 84 is not taken into account on this point the charge is still in order as long as the time is not essential to the offence. In any event, time can still be added afterwards by virtue of section 86'.

his trial was not conducted in accordance with the basic notions of fairness and justice. I accordingly do not share my colleague's view in the minority judgment regarding these issues.

[97] While the charges are couched in broad terms as regards the period in which the offences were alleged to have been committed, they specified what the appellant was accused of having committed during the relevant periods. In any event, he never complained of any inability to plead for lack of understanding of the charges, at any stage in the proceedings. He knew what charges he had to answer to and pleaded without any difficulty by denying all the allegations against him in terms of s 84 of the CPA[15] read with s 35(3)*(a)* of the Constitution.[16]

[98] For those reasons the appeal is dismissed.

N P MABINDLA-BOQWANA
ACTING JUDGE OF APPEAL

[15] '**84. Essentials of charge.**—(1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.
(2) Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge.
(3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient.'

[16] '**35. Arrested, detained and accused persons**
. . .
(3) Every accused person has a right to a fair trial, which includes the right—
(a) to be informed of the charge with sufficient detail to answer it.'

Cachalia JA (dissenting)

Introduction

[100] The first judgment speaks eloquently of the terrible toll of sexual abuse on its victims. This is why public policy demands that crimes of this nature are properly investigated, prosecuted and tried. Where the courts properly convict perpetrators the sentences imposed should reflect the gravity of the offence. However, in *Bothma v Els*[17] the Constitutional Court cautioned:

'The gravity of the offence and the public interest in ensuring that perpetrators are brought to book can never in themselves justify a conviction if the evidence is insufficient.'

This appeal demonstrates this pithy statement graphically. I have read the judgment of Mabindla-Boqwana AJA (the first judgment). I respectfully disagree that the appeal should fail. I would uphold the appeal. My reasons follow.

[101] The sexual crimes for which the appellant stood trial – twelve in all – span four years, between 1998 and 2002. The appellant was tried in a regional court in 2006, and was legally represented throughout. In August 2009, in an *ex tempore* judgment, the magistrate acquitted him on the rape charge in count 12, and, convicted him on the remaining 11 counts: four of rape and seven of indecent assault. He was sentenced in June, the following year. On each of the rape counts he was given a sentence of ten years' imprisonment, and three years on every count of indecent assault. The sentences were ordered to run concurrently. In the result he was sentenced to ten years' imprisonment. The magistrate declined to give further reasons to justify his findings. The appellant appealed only against his convictions.

[102] The appeal came before two judges in the Gauteng Division of the High Court in December 2016. They were divided and could not reach a decision. The matter

[17] *Bothma v Els and Others* [2009] ZACC 27; 2010 (2) SA 622 (CC) para 81.

was then referred to a full court. The three judges too, were unable to reach unanimity. The majority dismissed the appeal on all counts; the minority – in a persuasive judgment – would have upheld the appeal, also on all counts. I shall refer to the two judgments in the full court as the majority and minority judgments respectively. The appellant applied for, and was granted special leave by this court on 18 June 2018.

[103] It is apposite to point that an applicant for special leave must meet a higher threshold than merely showing a reasonable prospect of success. He must show special circumstances that justify this. These would include raising a substantial point of law, that the issues – even of fact – raised are of public importance or that there are strong prospects of success.[18] He satisfied all these requirements, as this judgment shall demonstrate.

The proceedings in court of first instance (the trial court)

[104] Section 84 of the CPA read with s 35(3)*(a)* of the Constitution requires an accused to be informed, with sufficient detail, both as to the time and place where the offence was allegedly committed as may be reasonably sufficient to inform him of the nature of the charge.[19] The charges should also be clear and unambiguous. Fairness to the accused demands this.

---

[18] D Harms *Civil Procedure in the Superior Courts* at C 1.26; *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A).

[19] Sections set out in fns 15 and 16 above provide as follows:

'**84. Essentials of charge**

(1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.'

'**35. Arrested, detained and accused persons**

. . .

(3) Every accused person has a right to a fair trial, which includes the right—

(a) to be informed of the charge with sufficient detail to answer it'.

[105] Hiemstra observes that apart from considerations of fairness towards the accused and compliance with legal provisions, precise formulation of the charges serves as a useful exercise for the prosecutor, who has to consider the evidence at the State's disposal and the core elements of the charge or charges he or she wants to prove.[20]

[106] Section 83 of the CPA is also important when it is doubtful which offence was committed.[21] It allows a prosecutor to formulate a single charge, multiple charges or alternative charges if it is uncertain what may be proved, subject of course to the accurate formulation of the charge or charges. Here too, the judicial officer and the accused must be left in no doubt what must be proved and the case that must be answered.

[107] Where the charges are unclear or vague, the accused is not left without a remedy. He may object, in terms of s 85*(d)* of the CPA, that the charge lacks sufficient particularity to allow him to plead. The court may order the State to remedy the defect or if it is unable to, quash the charges.

[108] As will become apparent when I consider the charges against the appellant most were unclear and vague regarding the times and the precise acts he was alleged to have committed.

---

[20] A Kruger *Hiemstra's Criminal Procedure* (Electronic version, 2020) at 14-9.

[21] Section 83 provides:

'If by reason of any uncertainty as to the facts which can be proved or if for any other reason it is doubtful which of several offences is constituted by the facts which can be proved, the accused may be charged with the commission of all or any of such offences, and any number of such charges may be tried at once, or the accused may be charged in the alternative with the commission of any number of such offences.'

[109] At the conclusion of the trial, if the judicial officer convicts an accused, there should also be no doubt why. This must appear from the reasons of the judgment. The duty to provide reasons lies at the heart of an accused's constitutional right to a fair trial in s 35 of the Constitution.

[110] In this regard rule 67(5) of the Magistrates' Courts rules stipulates that the magistrate must provide 'a statement in writing' (a judgment) showing: the facts found proved; the reasons for any finding of fact specified in the appellant's grounds of appeal, and the reasons for any ruling on any question of law or as to the admission or rejection of evidence so specified as appealed against.

[111] The list of factual findings and reasons therefore serves several important purposes. First, it focusses the judicial officer's mind on the justification for each finding of fact or law; secondly it enables the appellant to formulate the grounds of appeal, and thirdly, it assists an appeal court in its task.

[112] Where an *ex tempore* judgment does not adequately deal with the matters raised in the grounds of appeal, a mere reference to the judgment is insufficient. Rule 67(5) therefore serves an important purpose in affording the magistrate the opportunity to deal specifically with the points in the grounds of appeal. However, in this case, the magistrate merely signed off a standard template indicating that he had 'nothing to add to [his] reasons for conviction and sentence as contained in [his] *ex tempore* judgment'.

[113] It seems that the magistrate had not even had sight of the notice of appeal, which was delivered to the clerk of the court on 24 June 2010. The magistrate's standard response was signed more than a month earlier, on 9 May 2010.

This suggests that he was not even aware of the grounds of appeal when he signed this pro forma document, or that there was no appeal against the sentence.

[114] As I shall endeavour to point out when dealing with the evidence on each count, had the magistrate considered the appellant's grounds of appeal he would have realised that his judgment did not pertinently deal with some of the specific points raised in the grounds of appeal, and that a failure to supplement his reasons would be irregular for failure to comply with his duty under s 67(5). He would also have realised that there were errors in the judgment and parts of it were missing, which made it difficult to understand. The courts that had to adjudicate the appeal, including this court, were therefore placed at a disadvantage, and had to do their best with the inadequate material before them.

[115] I do not suggest that this failure on the part of the magistrate is itself a ground to vitiate the proceedings. But I shall show, by reference to the evidence that this failure to make specific factual findings and to provide proper reasons therefore contributed directly to the infringement of the appellant's constitutional right to a substantively fair trial, which I consider below at para 120.

The *ex tempore* judgment

[116] The judgment of the trial court is poorly constructed, error ridden and devoid of any clear reasoning. The court did not analyse the evidence on each count and made no specific factual findings in relation to any of them, as it was required to do. Instead, it adopted a broad-brush approach: First, it accepted that the complainant did not report the abuse, initially, for various reasons, including fear of reprisal from the appellant and opprobrium from her community. Second, it found that though there were contradictions and inconsistencies in her evidence, which were not dealt

with or explained in the judgment, these were not 'material discrepancies of contradiction', as they were attributable to the complainant's failing memory, rather than dishonesty. Third, it appears to have found that there were no 'inherent improbabilities'[22] in this regard, although it is not clear which evidence was being referenced. Midway through the judgment, after making these findings, and without having considered or analysed all the evidence it came to this conclusion:

'In short, in concluding the evidence of the state, after proper consideration of the evidence in light of the totality of the evidence that the court has evaluated, the court finds that the complainant impressed the court as a person whose evidence may actually be believed.'

[117] The trial court then dealt with and rejected the appellant's testimony regarding the complainant's possible motives for falsely implicating him in these crimes. Thereafter, it dealt, very briefly, with the Loftus Versveld incident (count 3) and rejected the appellant's version, again without proper consideration of the evidence.

[118] Finally, it held, also without providing any reasons, that count 12, the final charge of rape was not proved beyond a reasonable doubt, and it rejected as false the appellant's version on all the remaining counts. As I shall endeavour to show the failure by the magistrate to direct his mind to the reasoning for his conclusion on count 12 materially impacted upon his evaluation of the evidence on the other counts.

[119] There were also glaring legal errors in the trial court's approach to the evaluation of the evidence. First, it illogically approached its task in a 'compartmentalised and fragmented'[23] way, as the quoted passage above confirms. Secondly, as I shall demonstrate with regard to the assessment of the evidence on

[22] The judgment erroneously refers to inherited probabilities and not inherent improbabilities.
[23] *S v Trainor* 2003 (1) SACR 35 (SCA).

each count, it paid no heed to this court's injunction regarding the process of reasoning applicable to the proper test in a criminal trial:

'The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. **What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.**'[24] (Emphasis added)

[120] Third, it did not deal with the evidence on each specific count, apart from a superficial treatment of count 3. It convicted the accused on 11 counts without specifying the reasons why it found each count was proved. I shall demonstrate that these cumulative errors on the part of the trial court violated the appellant's constitutional right to a substantively fair trial in s 35(3) of the Constitution and consequently resulted in a failure of justice.[25]

The charges for January 2001 to June 2002

[121] I turn to count 12, the fifth rape count and final charge, which was one of the four incidents, according to the charge sheet, alleged to have taken place during the

[24] *State v Van Aswegen* 2001 (2) SACR 97 (SCA) para 8 quoting *State v Van Der Meyden* 1999 (2) SA 79 (W) 82C-E with approval.

[25] A Kruger *Hiemstra's Criminal Procedure* (Electronic version, 2020) at 24-1. Hiemstra observes that in its very first judgment in *S v Zuma and Others* 1995 (2) SA 642 (CC) para 16, the Constitutional Court held that the constitutional right to a fair trial embraced 'a concept of substantive fairness' that required criminal trials to be conducted in accordance with 'notions of basic fairness and justice'. It elaborated on this in *S v Dzukuda; S v Tshilo* 2000 (4) SA 1078 (CC) para 11 as follows: 'At the heart of the right to a fair criminal trial and what infuses its purpose, is for justice to be done and also to be seen to be done. But the concept of justice itself is a broad and protean concept. In considering what, for purposes of this case, lies at the heart of a fair trial in the field of criminal justice, one should bear in mind that dignity, freedom and equality are the foundational values of our Constitution. An important aim of the right to a fair criminal trial is to ensure adequately that innocent people are not wrongly convicted, because of the adverse effects which a wrong conviction has on the liberty, and dignity (and possibly other) interests of the accused.'

period January 2001 to June 2002. Its significance is fundamental to the outcome of this appeal. The other three charges were count 9 (indecent assault), and counts 10 and 11 (rape). As mentioned earlier, the magistrate acquitted the appellant on count 12, without giving reasons. In this court the State conceded that the convictions on the three other charges during this period were also not sustainable. The concession was properly made and, in effect, amounted to those convictions being abandoned. This notwithstanding, the first judgment, persists in dismissing the appeal on these counts.

[122] An analysis of the evidence on count 12 provides clear support for the magistrate's conclusion. Had he directed his mind to the reasoning, this would unavoidably have led to the appellant's acquittal on at least several other charges. An assessment of the evidence reveals this starkly.

[123] In her evidence in chief, the complainant testified that the rape, which forms the basis of the charge in count 12, occurred in June 2002. However, she also testified that the last incident, in June 2002, was the 'oral sex incident'.

[124] It is unclear to which incident she was referring, as count 9 was the only charge that mentioned that the appellant had, on two occasions, forced her to have oral sex by pressing her head against his penis. There was no reference in the charge sheet to either of these incidents having occurred at the same time as any of three rape counts during this period. It also appeared from the questions put to her that the prosecutor also understood the two incidents of oral sex to be part of count 9 (the sexual harassment charge) and not related to any of the three rape counts:

'Prosecutor: Right, what I would like to establish is you referred to the sexual harassment [continuing] during this period of time, January 2001 to June 2002. The same that you just

indicated and twice that he forced you to have oral sex. Now the three occasions of unprotected sex that took place, can you remember . . . Was it in between the oral sex, before it or after that? – The two was when I refused the oral sex.
Prosecutor: The what? – The two incidents [were] when I refused the oral sex.
Prosecutor: You refused: Yes, and then . . . Is it that when you had unprotected sex. – Yes, yes.
Prosecutor: Yes? – And the other one was in between.
Prosecutor: In between the two incidents of oral sex? – Yes.'

[125] Her evidence – still in chief – that there were three incidents of oral sex, of which two had occurred at the same time when she was raped, was clearly inconsistent with the allegation of only two such incidents in count 9. The allegation was also at odds with count 12, before its amendment, i.e., that the rape charge was alleged to have happened in July 2002, not June 2002.

[126] Following this part of the complainant's evidence the prosecutor applied for, and was granted, an amendment to the charge sheet to substitute June 2002 for July 2002, in count 12, despite opposition by the defence. The complainant then testified that the last incident of rape and oral sex occurred in June 2002. The rape before that, she said, did not involve oral sex, but the rape preceding it (the third rape) did. Other than confirming the three incidents of rape during this period, she gave no indication when the two incidents preceding the June incident took place.

[127] However, when cross-examined, she said that the last incident, which she now testified had occurred in June 2001, was when the appellant called her into his office, closed the door behind her, fondled her breast and touched her private parts. That was all he did; he did not rape her. When the inconsistency regarding both the date (June 2001) and the nature of the last incident was put to her she answered that she was confused about the dates. She maintained that the last incident, when the

appellant fondled her breast and touched her private parts, took place in June 2002. Again, when it was put to her that this version was still inconsistent with her assertion that she was raped on the last occasion, she answered that she was unable to differentiate between the dates on which she was raped and the others when she was sexually harassed. Why, counsel then asked, was she so sure that the last incident was in June 2002, as she had testified in chief. She answered:

'Because when I testified the previous time I took it from the beginning and it was much easier to go from the start right up to the end.'

This response revealed that she had rehearsed her version before giving her testimony and was unable to retain a coherent narrative when questioned closely.

[128] Cross-examined further, she adjusted her evidence, once again. This time she said that the last incident was a rape. When asked this time how she now remembered this rape when she had testified earlier that she could not remember the last incident she answered in an attempt to cover both rape and sexual harassment:

'That is why I am saying to this court between January 2001 and 2002 certain events happened which included sexual harassment and rape.'

Pressed even further she conceded that she could not remember whether or not the last incident was a rape. Neither could she remember the date or the year when it took place. At this stage count 12 for all intents and purposes had collapsed.

[129] It gets worse. It transpired that the complainant had instructed her attorney, Mr Kirpal, in 2004, to institute civil proceedings against the complainant's previous employer relating to these incidents. The allegation in her pleadings was that these various incidents occurred during the period 1998 to 2004. The charge sheet in the disciplinary proceedings against the appellant, also put the dates at 1998 to 2004, as does the presiding officer's judgment. Mr Kirpal was the prosecutor in the disciplinary case against the appellant, and the complainant also testified there.

[130] In the complainant's testimony in these proceedings, she denied having instructed Mr Kirpal that the last incident was in 2004. She also denied having given this evidence in the disciplinary proceedings. But, she was unable to explain how the date appeared in her pleadings. Nor could she explain how the judgment in the disciplinary proceedings reflected this date. The State called Mr Kirpal to corroborate the complainant's evidence. He attributed the date, 2004, in the pleadings to an error, but under cross-examination his explanation was so unsatisfactory that no credence could be given to it.

[131] The record of the disciplinary hearing was not produced in the trial court. It was therefore not conclusively proved that the complainant had given the incorrect date in her evidence in the disciplinary proceedings. But, in the absence of any satisfactory explanation regarding the appearance of the date in the pleadings and disciplinary proceedings, this raised further doubt about the complainant's evidence regarding the last incident having occurred in June 2002. The onus was on the State, not the defence, to remove any reasonable doubt in this regard. It did not.

[132] In summary, in regard to count 12, this much is clear. There were four different dates that emerged in the record as to when the last incident happened: the un-amended charge sheet, which put the date at July 2002; the amended charge sheet, which accorded with her evidence that it was in June 2002; her earlier evidence that it happened in June 2001, and, finally 2004, the date that appears in the pleadings and disciplinary proceedings.

[133] More fundamentally the complainant contradicted herself concerning the nature of this offence. The charge sheet in count 12 referred to rape. Her evidence in chief, however, referred to the 'oral sex incident' which, as she explained with

reference to the last incident, was that the appellant had ‘unprotected sex’ i.e., had raped her after she refused to have oral sex with him. She then contradicted herself by describing the last incident as one of sexual harassment, when he fondled her breasts and touched her private parts; there was no reference to any rape or oral sex. Thereafter, she testified that she could not remember what happened during the last incident.

[134] Apart from the fact that there were four different dates that emerged in the record as to when the last incident is alleged to have occurred, I find it not only improbable, but also not credible, that the complainant was unable to recall or distinguish whether this was a rape at all (with an attempt at oral sex) or merely an incident of sexual harassment. Had the magistrate properly directed his mind to the evidence, he would unavoidably have found, as he should have, that her testimony was not only unreliable but untruthful. The magistrate, therefore, correctly acquitted the appellant on this count. And with respect, he could not have come to any other conclusion. Which brings me to three other counts alleged to have happened during the period January 2001 to June 2002.

[135] Two of those counts – counts 10 and 11 – both alleged to be rapes and chronologically followed count 9, the indecent assault charge. These are three discrete charges, which the State had to prove separately. But it did not do this.

[136] The prosecutor was clearly taken aback by the complainant’s testimony, referred to earlier, that there were three, not two, incidents of oral sex as alleged in count 9. What is more, the complainant associated two of these incidents with a rape at the same time. The third incident of oral sex, she testified, happened between the two rape incidents.

[137] This evidence was inconsistent with the allegation in the charge sheet there were only two incidents of oral sex, and that they were part of the indecent assault charge in count 9, which chronologically preceded the three rape charges during this period. The prosecution would have appreciated that splitting two incidents of oral sex into three separate counts – one of indecent assault and two of rape – would constitute an improper splitting of charges and if convictions followed, would amount to an improper duplication of convictions. Yet, this is what the trial court erroneously found.

[138] Once it is accepted that count 12 was not proved, for the reasons stated earlier, counts 9, 10 and 11 also had to fall through a domino effect. Count 11 would fall because the complainant's evidence, which was materially inconsistent with the allegation in the charge sheet, was that the third incident of oral sex, happened between the two rapes. In other words it preceded count 12. But count 11 was a rape charge, not an indecent assault charge. So, count 11 had to fall. And, it follows that count 10 could not stand either because the charge preceding this was also rape, not indecent assault. It also bears mentioning that the State made no attempt to amend the charge sheet to accord with the complainant's evidence, which was also highly prejudicial to the appellant.

[139] The most glaring contradiction related to the number of times she was raped during this period. The charge sheet alleged three rapes (counts 10, 11 and 12). Her evidence in chief confirmed this, linking two of the rapes with an attempt to have oral sex. Under cross-examination, however, she testified that the appellant had raped her only twice during this period. Only to adjust her evidence later to three, again.

[140] It also appears from her pleadings in her civil claim against her employer that there was no allegation that the appellant had raped her five times. If this was what her case was, each rape would have constituted a separate cause of action for which the employer would be liable for damages. Her particulars of claim, however, alleged:

'During or about the period 1998 to 2004 and at or near the premises of AMG and also at Loftus Versveld Stadium, Pretoria, the said Koos Venter, and during working hours, had sexual intercourse with the plaintiff without her consent.'

The claim as formulated suggests that her claim was aimed at establishing two incidents of rape, not five. This gives further credence to the appellant's contention that the three further charges of rape (counts 10, 11 and 12) were simply made up. The trial court ignored all these glaring contradictions, as, with respect, does the first judgment.

[141] Count 9 – indecent assault – provides further reason for why the four charges during this period fell woefully short of the standard required for a conviction. The unlawful acts alleged during the period here were that he touched and/or rubbed and/or inserted his fingers into her vagina and/or groped her breasts and also on two occasions forced her to have oral sex by pressing her head against his penis.

[142] It is unclear whether the acts other than the oral sex incidents, which are alleged to have happened on two occasions, are also alleged to have occurred on several occasions or only once. It is unfair to expect an accused person to plead, much less defend himself, against such vague allegations. The evidence reveals this starkly.

[143] I have pointed out earlier that in her evidence the complainant linked two of the incidents of oral sex to the rape allegations, and a third that was not mentioned in the charge sheet, contrary to the allegation in count 9.

[144] Her evidence on count 9 was even less clear. When asked by the prosecutor to explain 'exactly' the nature of the sexual harassment between January 2001 and June 2002, she answered vaguely and generally:

'He used the same tactics whereby I had to bring documents to his office. He would then close the door. It would either be him fondling my breasts or touching my private parts, always from behind.'

[145] This vague, unspecific response, prefaced by the words, 'he would' was a constant theme of her testimony. Thus when asked to describe what the appellant did on the first incident of oral sex, her answers proceeded as follows:

'As usual he would call me into his office, he grabbed me from behind and first started fondling my private parts.

By fondling with your private parts, what did he do exactly with your private parts? – He would play with my vagina with his fingers.

Did he at any stage insert his fingers in your private parts (on other) occasions? – No.

Put his fingers inside your vagina? – No.

Right, on the other occasions where he did not force you to have oral sex with him, did he at any stage put his fingers in your private parts there? – During the sexual harassment yes.'

When cross-examined as to whether he had inserted his fingers into her private parts during this period, her response was she could not remember but it could have happened 'during the sexual harassment acts'. Later she testified that 'it is a possibility' that he did and thereafter she said that 'he could have'.

[146] The complainant then proceeded to explain how the appellant had raped her. What this passage illustrates, starkly, is not just the generality of the evidence, but

the prosecutor putting leading questions to her regarding the alleged insertion of the appellant's fingers into her vagina, and her materially contradictory response thereto. What is more, the evidence on one charge of indecent assault was spread over the period of 18 months with no dates and even approximate times, the exception being the last incident in June 2002, which she testified implausibly:

'I am not sure whether it was sexual harassment or whether it was rape. I cannot remember. But an incident did occur.'

[147] It is apposite to once again refer to her civil claim. Her particulars of claim, as it related to the allegations of indecent assault read as follows:

'During or about the period 1998 to 2004 and at or near the premises of AMG and also at Loftus Versveld Stadium, Pretoria, the said Koos Venter committed various acts of assault indecency upon the plaintiff on various occasions inter alia

1. Fondling her breasts
2. Touching her vagina
3. Rubbing himself against the plaintiff in an act of simulated sexual conduct, and
4. Touching her legs.'

There is no reference to the most serious allegation in count 9, or to any of the other indecent assault charges pertaining to either the insertion of his fingers into her vagina or having attempted to have oral sex with her. There was no explanation for this discrepancy. Also noteworthy is the allegation that the appellant touched her leg without her consent. In this regard, it was not her evidence that the appellant had done so; it was that she had told Mr van Staden that the appellant had done so, so that he would remain in the office when she worked overtime to protect her from any further abuse. The allegation, on her own version, is false.

[148] It follows that given the vague nature of the allegations in count 9 together with the lack of clarity in her evidence regarding the number of incidents, when they

were alleged to have taken place, and what exactly was done on each occasion, the conviction on this count was also bad. The inevitable conclusion is that the convictions on counts 9, 10 and 11 could not stand, not only because her evidence was contradictory in several material respects, and therefore unreliable. But, even more important, because the inference that she was untruthful, is irresistible.

Counts 5-8 (2000)

[149] Counts 5 to 8 are alleged to have happened in 2000: count 5, in January, when the appellant was accused of having indecently assaulted the complainant by rubbing and/or groping her vagina; count 6 in January was a charge of rape; the only rape count in 2000, count 7, indecent assault, is alleged to have happened during July to August, the allegation being that he also rubbed and/or groped her vagina; but this time also groped her breasts, and count 8, also indecent assault, which occurred between September and December when he indecently assaulted her by groping her breasts.

[150] In respect of count 5 the evidence read as follows:

'Prosecutor: Can you tell the court what was the sexual harassment that took place in January 2000? – It was always the same tactics as I have mentioned before where he would fondle my breasts or touch my private parts from . . .

And where did this then happen? – At our offices.

Right, so this was during January 2000 is that correct? – that is correct.'

[151] This was the sum total of the evidence upon which the conviction on count 5 was based. As I have mentioned above, this charge specifically excluded a reference to his having groped her breasts. Yet, her answer included this in another generalised response. Given the vagueness of the allegation and the evidence, no court could convict on this charge.

[152] In respect of count 7, her evidence was that from February until June 2000 the appellant was away from the office on hunting trips, but she knew the sexual harassment would continue upon his return. No evidence was led in chief regarding the two allegations in this count. Counsel for the appellant cross-examined her on this allegation too, and elicited another vague response:

'The normal sexual harassment at the office, he would use the same tactics where I would bring documents to his office. He would grab me from behind, fondle my breasts and later my private parts and I would always tell him to stop . . .'

[153] This happened many times, she added. As to whether the appellant only touched her vagina or inserted his fingers into it, she answered, again without any specificity:

'He used to touch on some occasions and on one or two occasions he inserted his fingers.'

[154] On Count 8, she testified that between September and December 2000, after she had returned from hospital, the appellant groped her breast on top of her clothing 'often'. She confirmed this under cross-examination. This evidence was also inconsistent with the charge sheet, which did not refer to multiple incidents. I shall return to this count at the end of my judgment, when I assess all the evidence.

[155] Count 6 is the second count of rape, which is alleged to have happened in January 2000. Here, the complainant's evidence was much more specific. I need not recount it. It is notable that in this instance she was able to give the exact time when it happened, at 16h30 after work. She testified that the following day, she told Mr Van Staden that if she was asked to work after hours, he should also stay on, because the appellant had touched her legs. Neither he, nor she, said anything further. This evidence was inconsistent with Mr Van Staden's testimony, to which I shall

return. Suffice to say, at this stage, that the magistrate did not deal with any of these charges in his judgment, or explain why he had found the appellant guilty.

The Period May 1998 to December 1999

[156] Counts 1, 2 and 4, all relating to indecent assault are alleged to have occurred during the period from August 1998 until December 1999. The allegation that there was a rape – the first one – during the period January to March 1999 at Loftus Versveld Stadium is the subject of count 3, which has received considerable attention in all the judgments. I shall deal first with the indecent assault charges.

[157] Count 1 alleged that in August 1998 that the appellant loosened the complaint's trousers and rubbed/or groped her vagina. Count 2, alleged to have taken place between August and September 1998, is when he allegedly reached inside her blouse, groped her breast and made pelvic movements against her body. Count 4 is alleged to have occurred over a period of ten months between March and December 1999, when he groped her breasts and/or rubbed her vagina and/or groped it.

[158] In regard to count 1 she testified that in August 1998, the appellant called her into his office, closed the door, grabbed her and started touching her. He unbuttoned her trousers, put his hand inside her underwear, and fondled her vagina. She managed to pull away, opened the door and returned to her desk. She could not remember the time of the day when this happened, but it was during office hours.

[159] When asked during her examination in chief why she had not reported this to anyone she gave various reasons. These included that she was 'scared and terrified' as she had been there for a short period, that reporting sexual harassment or rape would be frowned upon in her culture, that she feared her husband would leave her,

and also because the environment in which she worked was dominated by Afrikaner males, which made reporting such conduct difficult. Her evidence in this regard was not confined to count 1, but was also proffered as the reason for not reporting the other incidents earlier.

[160] There is nothing implausible about a woman, who has been sexually abused, being reluctant to report it. This is because the victim often feels a sense of shame and guilt at what has happened. Nonetheless, when she provides an explanation for not reporting the abuse, her version must still be subjected to scrutiny to avoid any injustice that may result from a false claim of abuse.

[161] There were two serious inconsistencies in her version. First, she testified that she had reported the 'sexual harassment' to Mr Langner, the appellant's supervisor, immediately after the rape in count 3, which is dealt with below. Mr Langner was the most senior person in the organisation; on her version he was hardly her first port of call, in a male dominated environment. Secondly, she testified that she reported another instance of sexual harassment to her colleague, Mr Van Staden, after the alleged rape in count 6, when she told him that the appellant had touched her legs. He is also an Afrikaner male, who was her friend with whom she discussed her marital problems. She testified that she did not report the abuse to him because she did not fully trust him. But this is also inconsistent with her reporting that the appellant had allegedly touched her legs, which she also considered was sexual harassment, as is evident from her pleadings in the civil proceedings. These inconsistencies cannot be wished away, as the magistrate did, and as, with respect, the first judgment also does.

[162] On count 2, the complainant testified that the appellant called her into his office between August and December 1998, to give her a hug for the good work she was doing. He reached out from behind her, put his hand inside her blouse, touched her breast inside her bra, and simulated sex by moving his pelvis against her. She told him to stop, and again managed to pull away and returned to her office. In December she went on leave.

[163] Under cross-examination, she testified that she had been indecently assaulted on only one occasion during this period, contrary to her evidence in chief. This was when the appellant called her into his office, unbuttoned her blouse, and touched her breasts. This version too was inconsistent with her evidence in chief, where she did not mention that he had unbuttoned her blouse. She did, however, repeat that he made movements with his pelvis against her. The incident, she said, also happened during office hours.

[164] On Count 4 she testified that there were numerous occasions between March and December 2009 – a period spanning ten months – when he called her into his office and would either touch her on her breasts or her vagina. However, under cross-examination she changed her version, saying that she was only sexually harassed from August to December 1999. And when questioned further, changed her version again by saying this happened between June and December 1999. Of these dates, she said, she was certain. And further, when it was put to her that her original version was that this happened between March and December 1999, she again adjusted her evidence to these dates. Once again, when asked why she specifically remembered that there was an incident in August 1999, she responded, quite implausibly, that this was because it was the ‘first incident’. Pressed even further, she adjusted her evidence again, saying the first incident was in August 1998.

[165] It is apparent from an analysis of her evidence regarding the first three incidents of indecent assault that her evidence was unreliable: For the period from August to December 1998, the appellant faced two counts of indecent assault, which she also testified to in chief, but under cross-examination said there was only one, count 2. There was therefore no basis to convict the appellant on count 1. In regard to count 4 her evidence was vague, inconsistent, and contradictory. When confronted with the inconsistencies, she simply made up her answers. There was, I accept, nothing implausible about her evidence on count 2, despite her having only mentioned the unbuttoning of her blouse under cross-examination. But in the face of her other unreliable and uncorroborated evidence, there is simply no basis to reject the appellant's disavowal of guilt on these charges. The magistrate did not deal with any of the evidence pertaining to these indecent assault charges. The appellant should therefore have been acquitted on these charges as well.

[166] This brings me to count 3, the Loftus Versveld incident. The alleged assault is fully described in the first judgment and need not be repeated. On her account this was a brutal rape that left her seriously injured. It is not in dispute that the complainant accompanied the appellant to Loftus Versveld. The circumstances that led to the alleged rape, the year and month when this occurred, whether she was raped and what transpired afterwards were all in dispute. A close examination of the evidence does not justify the conviction.

[167] The year and month when the incident happened is important because of what happened thereafter. The complainant commenced her employment with the appellant in May 1998. Among her duties was to manage the appellant's diary, which, she appears to have done competently. Her evidence was that the Loftus incident happened between January and March 1999, during the morning.

She recalled that it was after she had returned from the December vacation, in January. After he had raped her, they returned to the office. He then left.

[168] There was a dispute whether they travelled in one or two cars. The complainant and Mr Van Staden said they travelled in one car. The appellant said they went in two cars and Mr Van Coller confirmed that they arrived and departed in two cars. The magistrate rejected the appellant's version on this aspect on the ground that it is unlikely that the complainant would have told him, so soon after she commenced her employment, that she wished to travel in two cars because her husband was jealous a person.

[169] The magistrate was entitled to be sceptical of the appellant's testimony on this aspect. But he could not reject it as implausible. His evidence was supported by Mr Van Coller, which the magistrate ignored. Importantly, it was also apparent that the complainant was having marital problems at the time, which lends support to the appellant's version. Ultimately, this is a collateral issue and is not decisive.

[170] The appellant's evidence was that they went to Loftus Versveld in May 1998, shortly after she had commenced her employment. The trip, he said, was part of her induction, as this was where they entertained their customers. The date was diarised. Afterwards, they drove to the Air force base at Waterkloof, before returning to their office. At Waterkloof the appellant introduced her to Mr Van Coller, who reported to him, and explained the nature of Mr Van Coller's work to her. Mr Van Coller confirmed the visit, at about midday, and testified that the appellant told him that they had just visited the place at Loftus Versveld. He also introduced the complainant to his staff. Mr Van Coller's observation was that she seemed nice and was very friendly. The appellant and complainant then returned to their offices.

[171] The complainant's evidence, as I have mentioned, was that the Loftus incident happened between January and March 1999. She was absolutely clear of two things: that this happened after the December vacation in 1998, and that there were two incidents of sexual harassment that preceded it (counts 1 and 2). But I have already found that the complainant materially contradicted herself as to whether there were one or two incidents of indecent assault preceding the rape. More importantly, I find it improbable that she would have been mistaken about this, even though it happened a long time ago.

[172] I also find it difficult to believe that she was unable to remember the date of the Loftus incident with more certainty; she put it at between January and March 1999. But it was, on her version, a brutal act of sexual violence, the first she had experienced, and that had caused her considerable trauma. She kept the appellant's diary and would have been aware of the important dates. When exactly the incident took place is not something that she would likely forget. And given the material dispute about the date, one would have expected the State to investigate this more closely, rather than relying on her uncertain recollection of the dates.

[173] Given her complete inability to remember the date, there is simply no room in the evidence to reject the appellant's version that the trip to Loftus Versveld took place in May 1998, during the complainant's induction. And there was no basis to simply ignore Mr Van Coller's evidence. Mr Van Staden, who testified on the complainant's behalf, also confirmed that the trip to Loftus happened in 1998. In other words, three witnesses put the Loftus incident at May 1998, shortly after she commenced her employment. She stood alone on her version. The problem extends beyond a mere dispute about dates.

[174] In addition, having just endured a brutal rape, it is also unlikely that she would have been 'nice and very friendly' shortly afterwards, as Mr Van Coller testified. His evidence, in this regard, was also not disputed. Her evidence also does not square with Mr Van Staden's evidence. He testified that he asked the complainant the following day how the visit to Loftus had gone, and she replied: 'nogal mooi' which, freely translated, means 'actually quite nice'. This response also seems perversely counterintuitive, and is inconsistent with her having endured a traumatic event.

[175] One of the reasons given by the majority in the court a quo for rejecting Mr Van Coller's evidence was that the complainant was not cross-examined on the appellant's version that she was not taken to Mr Van Coller's place after the rape but returned directly to her office. This is not correct. She was asked pertinently under cross-examination whether she went to his office at Waterkloof after the Loftus incident. More significantly Mr Van Coller's evidence was not disputed by the State.

[176] Her testimony about what happened after this was also dubious. She testified that after she returned to the office she phoned the appellant's boss, Mr Langner, and complained that the appellant was sexually harassing her. He said he would come back to her, but he never did. Apart from the fact that it is odd, though not inherently improbable, that a rape victim would minimise the description of the offence, Mr Langner emphatically denied having received this call from her. There is no reason to disbelieve him.

[177] The magistrate, however, rejected his evidence on the basis of Mr Langner's close relationship with the appellant, which he inferred from the fact that they had been on hunting trips together. The magistrate may have been justified to approach Mr Langner's evidence with a degree of caution, because of this relationship.

But there was nothing improbable, much less inherently improbable, in his evidence. There was no proper basis to reject it, or for finding that Mr Langner, who by all accounts, had a reputation for fairness, was protecting the appellant.

[178] Her version runs into other difficulties. She did not mention this phone call to the investigating officer, which was a critical bit of information in any investigation involving sexual abuse. In the disciplinary hearing, she testified, contrary to her evidence in the trial court, that she did not mention the incident to Mr Langner because he would have done nothing about it. And finally, Mr Van Staden testified that she told him that the appellant had touched her legs when they were getting into the car to go to Loftus, about two weeks after the Loftus incident. Her evidence, however, was that she said this to him on the day after she was raped in January 2000, more than eighteen months later. These two versions are irreconcilable, and again, cannot be dismissed simply on the basis that she may have been mistaken or confused about dates. The appeal against the conviction on count 3 therefore has to succeed

[179] What remains is the evidence of Ms Trudie van der Westhuizen, the complainant's psychologist. It need not be dealt with in any detail. It was pointed out by the minority judgment in the court a quo that the complainant reported the sexual assault to her long after the first incidents, including the one at Loftus, had occurred. However it was also observed, in my view correctly, that there were various discrepancies in the versions of both witnesses. These are set out in the minority judgment and need not be repeated.[26] Apart from these discrepancies, whatever the complainant said to her psychologist does not amount to corroboration

[26] Judgment of the High Court para 73.3.

in respect of the charges against the appellant. If anything, it raises even more doubt about the reliability and veracity of much of the complainant's evidence.

[180] It emerged from Ms van der Westhuizen's testimony that the complainant suffered serious physical, emotional and violent sexual abuse by her husband. This is why the appellant first sought professional assistance, in December 1998 and regularly thereafter. The abuse, it is common cause, led to their separation and divorce between 1999 and 2000, during the period when she alleged that much of the abuse by the appellant also occurred.

[181] It is thus unclear why the complainant was comfortable to report her husband's abuse to Ms van der Westhuizen (if this was frowned upon in her culture as she testified), but not the alleged abuse by the appellant. On the complainant's version she reported the Loftus incident to Ms van der Westhuizen only a year later, in the midst of her separation. It seems also reasonable to infer, as the minority judgment does, that the complainant was an emotionally fragile person whose evidence had to be considered with additional caution.[27]

[182] The other evidence that raises some doubt regarding the complainant's version of these events is her evidence that all of them, except the Loftus incident, took place at their offices. Of these, count 6, the rape charge in January 1999, was the only one alleged to have happened at 16h30, i.e., after work. The other ten, including the three rapes, all happened during office hours. I find it improbable that the appellant would place himself at risk by merely closing the door to his office and commit these crimes – in particular three rapes – while there were several members of staff at work close to his office.

[27] Judgment of the High Court para 76.

Conclusion

[183] The appellant had to defend himself against multiple charges of sexual crimes alleged to have taken place over a four-year period. The charges were framed vaguely and lacked specificity both as to the nature of the acts and the times when they were committed. The difficulty in having to defend himself was manifest.

[184] In *Bothma v Els*[28] the Constitutional Court referred to a case from the Canadian Supreme Court in *R v Carosella*[29] regarding the difficulty that accused persons sometimes confront in gathering rebuttal evidence to demonstrate their innocence in sexual crimes. It was precisely for this reason, said the court, that the State bears a heavy onus to prove all the elements of guilt beyond a reasonable doubt.

[185] The appellant denied his guilt and testified to his innocence. Where he was able to, he led rebutting evidence, as in count 3 (the Loftus incident), of Mr van Coller and Mr Langner. Their evidence, I have pointed out could not be rejected. Their evidence was corroborated. The appellant's version on two critical parts of the evidence – when it happened and what happened afterwards – was not improbable, much less inherently improbable. It was reasonably possibly true. The corollary was that the complainant's version, which stood alone was not.

[186] The State produced no evidence to corroborate her version of events on the remaining 11 charges either. The trial court was left with two versions: hers and his. There was no basis to disbelieve him. Apart from her evidence there was nothing to gainsay his denial on each of the charges. Yet his evidence too was rejected for no good reason. And as the minority judgment pointed out, again with respect correctly,

[28] *Bothma v Els* 2010 (2) SA 622 (CC) para 81.
[29] *R v Carosella* [1977] 1 S.C.R 80 para 105.

that the appellant's evidence under cross-examination in ascribing possible motives for the accusations against him did not justify its rejection.

[187] Even more troubling was the approach of the magistrate in analysing the evidence. Having taken the view on what is sometimes referred to loosely as the 'totality of the evidence' that the complainant 'may be telling truth' he rejected the appellant's evidence. Then, without any analysis of the evidence on each specific count convicted him on 11 counts while acquitting him only on count 12. As I have mentioned, his failure to direct his mind to the reasons for that acquittal contributed to his erroneous approach to the evidence on the other charges. In my respectful view, the majority judgment in the court a quo and the first judgment in this court repeat this error.

[188] However as I have endeavoured to show in my treatment of the evidence there were either no or insufficient grounds to convict him on any of the counts. In summary, on count 12, her evidence was not only unreliable, but untruthful. And once the conviction on this charge is not sustainable, the appeal against the convictions on counts 9 to 11 also had to succeed, for the reasons given earlier, and as was properly conceded by the State.

[189] The fact that her evidence pertaining to those charges was so unreliable, and in some instances obviously untruthful, was further reason to scrutinise her evidence on each of the other charges with caution. On counts 5, 7 and 8, the indecent assault charges, I have pointed out the charges and the evidence were too vague for the convictions to stand. On count 6, the rape that allegedly took place at 16h30 at the offices her evidence here was, by contrast, quite specific. It could not be said that her evidence on this charge was implausible. But, it was also uncorroborated.

As against this was the appellant's denial of the incident that could not be summarily rejected, as false. The State, therefore, did not discharge the onus upon it.

[190] Counts 1, 2 and 4, the remaining indecent assault charges and evidence were also lacking in specificity. In respect of counts 1 and 2 she contradicted herself as to whether there were one or two incidents during this period. Here too, there was no basis to prefer her evidence against his.

[191] The approach of the trial court, the majority in the court a quo, and the first judgment in this court was to take a broad view of the evidence and conclude, somewhat intuitively, that because she was telling the truth, he could not be, as if there was an onus on him. No attempt was made to investigate whether each count was proved or not. If we test this by asking whether the appellant would have been convicted on 20 counts if so charged, the question would answer itself.

[192] The real question ultimately is whether the State discharged its heavy onus on any of the counts with which the appellant was charged. It clearly did not.

[193] In addition the appellant's constitutional right to a substantively fair trial was violated in this case. The trial court committed legal errors by: dealing with the evidence in a piecemeal and compartmentalised way; improperly ignoring the material contradictions and inconsistences in the complainant's evidence; ignoring important evidence that supported the appellant's defence; failing to have regard to the vagueness and lack of clarity on the charges and considering the evidence on each charge by convicting the appellant on all counts on what it incorrectly considered was 'the totality of the evidence' and, irregularly failing to direct his mind to the reasons for his judgment in terms of rule 67(5) Magistrates' Court rules.

[194] I would accordingly uphold the appeal on all counts.

_____

A CACHALIA

JUDGE OF APPEAL

Mocumie JA (Molemela JA and Poyo-Dlwati AJA concurring)

[195] I have read both the majority and minority judgments. But regret that I cannot agree with the approach to the evidence or the conclusions of the minority judgment. The minority judgment raises issues which were not pertinently raised on appeal in the submissions made before us. Nor are they addressed in the heads of argument. My colleague first raises an issue that the charges lacked sufficient detail or are broad and vague. Second, that the trial court did not analyse the evidence in each count and give reasons for the convictions but rather gave broad findings. He also criticises the evidence of the complainant as being riddled with material inconsistencies. The majority judgment has dealt with these issues in detail, I therefore do not find it necessary to rehash those, suffice to say what I mention hereafter. What I disagree with is the minority judgment's approach where the trial court is criticised extensively for not applying its mind to the facts before it and on record.

[196] First, the issue of vagueness of the charges preferred against the appellant. The appellant did not complain about the vagueness of the charges. To the contrary as aptly observed in the majority judgment, the appellant pleaded on all the counts without fail and the complainant was cross-examined at length on all. In the event that there was any complaint, nothing stopped the defence from asking for further particulars before the trial commenced. Second, to object in terms of s 85*(d)* of the

CPA read with the relevant sections. The accused, particularly a defended one, would be entitled to ask for further particulars from the State until the defect has been cured. In this case, it is common cause, this readily available avenue was not pursued. Thus, it cannot be raised on appeal and *mero motu* by the appeal court. I accept that the court of appeal cannot close its eyes in the face of injustice but in this case none was shown.

[197] As is trite, a court of appeal will not readily interfere with the factual findings of the trial court unless it is clear from the record that the trial court had materially misdirected itself or erred to the extent that its findings were vitiated and fell to be set aside.[30] My colleague in the minority judgment has accepted in para 115 of his judgment that the failure by the trial court to deal with some specific points is not in itself a ground to vitiate the proceedings.

[198] I accept that a misdirection may arise where the trial court has overlooked certain facts or when reasons given are on the face of it unsatisfactory or are not borne out by the record.[31] The court of appeal may itself look at the evidence and come to its own conclusion on the matter.[32] That has however not been alleged in this case. Nonetheless, my assessment of the evidence, having regard to the inadequacies raised by my colleague, the conclusions reached by the trial court were correct. An important consideration is that while a trial court should ensure that all evidence is accounted for, it has been stated that 'it does not necessarily follow that because something is not mentioned it was not considered'.[33]

---

[30] *Mnyandu v Padayachi* [2016] 4 All SA 110 (KZP); 2017 (1) SA 151 (KZP) para 28; *Rex v Dhlumayo* 1948 (2) SA 677 AD at 698.
[31] *Rex v Dhlumayo* fn 30 at 698.
[32] Ibid at 703.
[33] *Mahlangu and Another v S* [2011] ZASCA 64; 2011 (2) SACR 164 (SCA) para 23.

[199] Furthermore, a court of appeal may be in as good a position as the trial judge to draw any inferences from the evidence on record. It may assess the evidence and come to its conclusion on the matter, which may be the same as that reached by the trial court. Additionally, '[a]n appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial [court]. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it was not considered.'[34] While the trial court may be criticised for its approach in not giving reasons in respect of each count, any misdirection due to the unsatisfactory nature of the reasons given by the trial court is not, in my view, a violation of the appellant's constitutional right to a fair trial in s 35(3) of the Constitution in this case.

[200] The respects in which specific counts were challenged, as stated in the minority judgment were not mentioned in the grounds of appeal or argument. The majority judgment dealt with issues that were pointedly raised on appeal as grounds for this court to interfere with the trial court's decision. In *S v Sefatsa and Others*[35] this Court observed:

'*It is generally accepted that leave to appeal can validly be restricted to certain specified grounds of appeal* . . . In practice this is frequently a convenient and commendable course to adopt, especially in long cases, in order to separate the wheat from the chaff. On the other hand, this Court will not necessarily consider itself bound by the grounds upon which leave has been granted. If this Court is of the view that in a ground of appeal not covered by the terms of the leave granted there is sufficient merit to warrant the consideration of it, it will allow such a ground *to be argued*.'

(Emphasis added.)

[34] *Rex v Dhlumayo* fn 30 para 706.
[35] *S v Sefatsa* 1988(1) SA 868 (A) at 877A-E.

[201] Regarding the evaluation of evidence by the trial court, the minority judgment, faults the trial court in its approach. He states that '[f]irst, it illogically approached its task in a "compartmentalised and fragmented" way. . .Secondly . . . it paid no heed to this court's injunction regarding the process of reasoning applicable to the proper test in a criminal trial. . .'. In reassessing the complainant's evidence, my colleague is of the view that the complainant's evidence lacked credibility all together. He found no fault with that of the appellant and his witnesses.

[202] It is trite that it is not for the accused to prove anything, but for the State to prove its case beyond reasonable doubt. However, the correct approach as is also established is:

'[T]o weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, *taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt*. The result may prove that one scrap of evidence or one defect in the case for either party. . . was decisive but. . . a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear.'[36] (Emphasis added.)

[203] I turn now to my observations on some of the specific issues raised by my colleague in the minority judgment. My colleague considers that the complainant's evidence is marred by improbabilities, inconsistencies and even untruthful accounts because she mixed up the incidents between rape and sexual assault and the dates in which those occurred. She detailed or referred interchangeably to sexual harassment, rape, indecent assault and groping. He further finds it improbable that these incidents

[36] *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.

could have happened during office hours when other employees were in the offices adjacent to the appellant's office where most of the incidents took place; and even more improbable that she could forget whether it was rape or groping that occurred first or last in one of the incidents.

[204] The trial court noted inconsistencies and contradictions in the evidence of the complainant. It took into account the fact that she testified about incidents that took place over a period of four years when she had just started working directly under the appellant and that she was subjected to consistent and frequent abuse a few months after she started working for him. She suffered from depression and unhealthy weight loss which were worsened by the abuse she encountered from the appellant.

[205] The dynamics of the power relations between the appellant and the complainant are an important consideration. The atmosphere of white Afrikaner male domination, according to her, prevailed within her work environment during that particular period. The appellant who was in charge as the COO, was feared. The fact that she reported an act of sexual harassment to two white Afrikaner men, Mr van Staden a colleague and Mr Langner, the supervisor at some stage, did not show inconsistency. She was embarrassed by the rapes hence she minimised the incidents in her reports to them. She however took a chance as she hoped the abuse would stop, first by Mr Langner talking to the appellant and second by Mr van Staden staying over if she got to be asked to work overtime again by the appellant. Reporting to medical professionals, Professor Spies and her psychologist, Ms van der Westhuizen, inconclusively confirmed that she had been subjected to sexual abuse. All these aspects judged objectively and dispassionately, lend support to what she maintained happened for over four years.

[206] In para 127 of the minority judgment my colleague states that the response the complainant gave on the inconsistency in her evidence as regards the date of the last incident, that when she testified in chief it was much easier because she 'took it from the beginning and it was much easier to go from the start right up to the end', '. . . revealed that she had rehearsed her version before giving her testimony'. This may be an unfair assumption. If her evidence was indeed rehearsed, one would expect that there should be no inconsistency or inconsistencies that are evident in her evidence.

[207] To the contrary, these are explicable inconsistencies. This witness had been through different enquiries and had to relate the events years after they had occurred. She was subjected to continuous, traumatising events. To impute impropriety on her part because of muddling the dates and events in relation to the last incident and because of the way the evidence was led in a disciplinary hearing without the benefit of the record, is unfair. In the trial court, the responsibility of the defence lawyer was to put the version of the appellant on each and every allegation that the complainant levelled against the appellant and he did so. The task of the trial court was to look at all the evidence presented on both sides including what emerged during cross examination and dispassionately weigh each against the other to establish whether the truth had been told.[37]

[208] At para 138 my colleague states that '[o]nce it is accepted that count 12 was not proved, for the reasons stated earlier, counts 9, 10 and 11 also had to fall through a domino effect. . .'. I do not agree with this approach if one considers the evidence led for that period in respect of each count. Except for count 12 for which he was acquitted, there was no confusion or material discrepancies in respect of counts 9 to

[37] *S v Sauls and Another* [1981] 4 All SA 182 (A); 1981 (3) SA 172 (A) at 180F-180G.

11. As to the effect of her confusion in respect of count 9 and 12, the majority judgment above deals efficiently with this view and I support the reasoning.

[209] At para 192 the minority judgment states that '[t]he real question ultimately is whether the State discharged its *heavy onus* on any of the counts with which the appellant was charged. It clearly did not. . .'. (Emphasis added.) It is trite that the State must prove its case beyond reasonable doubt. But it is not expected to close all avenues;[38] particularly where the defence is a bare denial. The ultimate responsibility lies with the trial court and courts of appeal to discern whether the State has discharged this responsibility with what it has before it and dependent on the truthfulness and reliability of the witnesses in assisting it to do so.

[210] In *S and Another v S*[39] this Court reflected as follows with respect to the proverbial question posed in criminal cases in all courts: Where does one draw a line between proof beyond reasonable doubt and proof on a balance of probabilities? It stated:

'The approach of our law as represented by *R v Mlambo, supra,*[40] corresponds with that of the English Courts. In *Miller v Minister of Pensions* [1947] 2 All ER 372 (King's Bench) it was said at 373H by Denning J:

"(T)he evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. *It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice.* If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence "of course it is possible, but not in the least probable", the case is proved beyond reasonable doubt, but nothing short of that will suffice."' (Emphasis added.)

---

[38] *R v Mlambo* fn 7 at 337.
[39] *S and Another v S* [2014] ZASCA 215.
[40] *R v Mlambo* fn 7.

[211] The question is what weight to accord the inconsistencies noted especially in the face of a bare denial. I do not agree with the minority judgment that the inconsistencies all had 'to fall through a domino effect'. Some were not material. Others such as the mentioning of sexual harassment, rape and touching inappropriately/groping, interchangeably and the mixing up of dates by the complainant, appeared to be a clear misunderstanding which arose, amongst others, as a result of how questions were put to her by the defence counsel. These appeared to have thrown her off balance from time to time. She indicated at some point during cross-examination that when she testified in chief she was able to start the evidence from the beginning to the end, as she clearly anticipated. Overall, despite the stated inconsistencies, the complainant's account was logical and detailed. She explained why she could not report the incidents as they occurred and why it took her that long to report these deeds. My colleague's criticism on the discrepancies seemed not to attach sufficient weight to the trauma that was caused by these events. According to the complainant the trauma she encountered affected her recounting of the dates and sequence of events. I consider it unfair to expect the complainant to remember exact dates, on the basis that she kept the appellant's diary, as my colleague pointed out. The suggestion that she was subjected to abuse at her home at the hands of her husband and hence her fragility should not cloud the assessment of whether she was sexually abused by the appellant. According to Professor Spies who testified without contradiction, there was a vast difference between sexual trauma in a marriage and outside of the marriage. She opined that 'if there was any sexual trauma in the marriage, the complainant could escape the sexual trauma by moving to her mother; but she could not afford to lose her job. . .' (Translated).

[212] I now turn to deal with issues highlighted in the minority judgment in respect of each count. No inconsistency is identified by my colleague as to how her evidence

in count 1 could be faulted except that she had at one point in cross examination stated that there was only one incident between August and December 1998, accordingly he ought not to have been convicted on count 1. The majority judgment has dealt with this issue and I agree with its clarification of the evidence in this regard.

[213] In respect of count 2 my colleague says he accepts there was nothing implausible about the complainant's evidence except that she did not mention the unbuttoning of the blouse in her evidence in-chief. Her evidence in relation to this count was that he inserted his hand inside her blouse. Surely the omission of 'the unbuttoning of the blouse' in her evidence- in- chief is a minor detail which she explained that she forgot to mention. In order for him to insert his hand inside her blouse, it is not implausible that he would have to have done so after having unbuttoned her blouse. That makes perfect sense.

[214] The majority judgment deals with the inconsistencies raised as regards count 3 which relates to the Loftus suite. It is not necessary to add anything further. As regards count 4, it is correct that there was a discrepancy with regards to the dates. The complainant initially testified that the sexual assault occurred between March and December 1999 but later stated it was between August and December 1999 in cross-examination and then between June and December 1999. In this regard she stated that she had a problem with the dates and had made a mistake. She further testified that she did not mean that sexual assaults took place every month but they had occurred during that period.

[215] The charge sheet and evidence relating to counts 5, 7 and 8 is said to be vague. The evidence in relation to these charges is similar. The complainant testified that the appellant would use the same tactics of touching her breasts and/or vagina.

In respect of count 5, it is stated in the minority judgment that the charge sheet did not say anything about groping of breasts to which she also testified. However, the evidence of the complainant was that the appellant would either fondle her breasts or touch her private parts. The fact that fondling of breasts is not mentioned in the charge sheet does not discount the charge as she mentioned that he also touched her vagina, which is contained in the charge sheet.

[216] In relation to count 7, my colleague states that the complainant did not present evidence in-chief. The complainant as the record shows, mentioned that the appellant would touch her as before and repeated the same evidence in cross examination. The majority deals with this at length.

[217] As regards count 8, the criticism is that reference to the incidents of sexual assaults occurring 'multiple times' is missing, whereas in her evidence the complainant stated that the incidents occurred 'often' in that period. The charge sheet refers to a period. It does not say how many times the sexual assaults occurred during that period nor does the complainant say so in her evidence. 'During the period' mentioned in the charge sheet, should in my view, cover her entire evidence in respect of count 8 when she says, the incidents were a lot more or often.

[218] As regards count 6 of rape, detailed evidence was given in respect of this charge. It is not strange why the complainant would remember a specific time when in other instances she could not. She testified that she knocked off at 16:15. The appellant told her that he needed to finish an urgent presentation and she went to his office at approximately 16:30. This time almost coincided with her knock-off time hence it should not strike as a surprise that she remembered it. It is not clear why her evidence in respect of this charge could not be accepted.

[219] She testified that she told Mr van Staden about being touched above the leg. According to her evidence this was because she was embarrassed and could not tell him about the rape and did not trust him completely as already mentioned in both judgments. The fact that she did not tell him about the rape, does not make her evidence in relation to count 6 untruthful. She stated why she did not tell him. As to whether or not the touching of the leg in fact had happened, she stated that on one occasion the appellant had touched her leg (ie when they were in the vehicle to Waterkloof). It is therefore not entirely correct that her version was that her leg was never touched. Yes, the appellant was not charged for that. According to the complainant she regarded this as a minor issue which she did not mention to the police in a statement.

[220] I agree with the majority judgment that the State proved its case beyond reasonable doubt in respect of all counts; that the trial court and the majority of the full court were correct for the reasons advanced; and that the appeal should be dismissed.

_____

B C MOCUMIE

JUDGE OF APPEAL

APPEARANCES:

For appellant:	J J Strijdom
Instructed by:	Rianie Strijdom Attorney, Pretoria
	Symington De Kock Attorneys, Bloemfontein
For respondent:	C Pruis
Instructed by:	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein.