



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: A112-2022

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED |

DATE

SIGNATURE

In the matter between:

WJC

FIRST APPELLANT

ZC

SECOND APPELLANT

and

THE STATE

RESPONDENT

ORDER

The following order is made:

The appeals against convictions and sentences of both appellants are refused.

MINORITY JUDGMENT

Greyvenstein AJ

Background

[1] The Appellants are respectively the biological father and mother (hereinafter referred to as the 1st and 2nd Appellant) of their girl child (hereinafter referred to as LA) and their boy child (hereinafter referred to as AJ), who were respectively five and eight years old at the time of the alleged commission of the offences in 2014.

[2] The Appellants were charged in the Regional Court of Pretoria North in case number SH1/61/2015 with the following counts:

Count 1: c/s 3 of The Sexual Offences and Related Matters Act, Act 32 of 2007 (hereinafter referred to as “SORMA”) – rape of LA;

Count 2: c/s 3 of SORMA – rape of AJ;

Count 3: c/s 5(1) of SORMA – sexual assault of LA;

Count 4: c/s 18(2)(b) of SORMA - sexual grooming of LA;

Count 5: c/s 4 of SORMA – compelled rape of AJ;

Count 6: c/s 21(1) of SORMA - compelling LA to witness sexual offences, sexual acts or self-masturbation;

Count 7: c/s 24B(1)(b) of the Films and Publications Act, Act 65 of 1996 – creation of child pornography;

Count 8: c/s 305(3)(a) or (b) or 305(4) of the Children’s Act, Act 38 of 2005 (hereinafter referred to as the Children’s Act) – child abuse or neglect. It is important to note that the chargesheet makes mention that the charge is c/s 305(3)(a) or (b) or 305(4) of the Children’s Act;

Count 9: assault with the intent to cause grievous bodily harm in respect of LA;

Count 10: assault with the intent to cause grievous bodily harm in respect of AJ;

Count 11: c/s 4(a)/4(b) of Act 140 of 1992 – possession of an undesirable dependence producing substance (metcathinone [*sic*] and dagga)¹.

[3] On 24 January 2017, both Appellants were found not guilty and discharged in terms of section 174 of the Criminal Procedure Act, Act 51 of 1977 on counts 9 and 10.

[4] On 5 August 2020, both Appellants were convicted on counts 1, 3, 4, 5, 6, 8, 11 and acquitted on counts 2 and 7.

¹It is unclear what the charge was. According to record of proceedings, the State put a charge of c/s 4(a) of the mentioned Act, but also added that the state “focusses on 4(b)”. Section 4(a) of the mentioned Act relates to the dealing in such substance and not with the possession or use thereof. It will be accepted that the State erroneously referred to section 4(a) of the mentioned Act.

[5] On 2 February 2021, both Appellants were sentenced to life imprisonment in terms of section 51(1) of Act 105 of 1997 on counts 1 and 5 and both Appellants were sentenced to various terms of direct imprisonment on counts 3, 4, 6, 8 and 11.

[6] Both the Appellants are before this Court on appeal against their convictions and sentence on counts 1, 2, 3, 5, 6 and 8. Both Appellants already conceded during the trial that they are guilty of the possession of undesirable dependence producing substances as alleged in count 11.

[7] It may be mentioned at this stage that both Appellants were acquitted on count 2 and reference to a conviction on count 2 in the notice of appeal and other papers before this Court is wrong.

[8] It may also be mentioned that the Appellants were convicted on count 4 (sexual grooming in contravention of section 18(2)(b) of Act 32 of 2007), although the notice of appeal does not mention this conviction. From paragraph 9.3 of the notice of appeal it is however clear that the appeal is noted against the conviction on count 4 as well.

Grounds of appeal²

[9] That the learned Regional Magistrate erred in finding that the State had proved beyond reasonable doubt that both Appellants are guilty;

[10] That the learned Regional Magistrate erred in finding that LA was a competent witness;

[11] That the learned Regional Magistrate erred in accepting the evidence of LA;

² Page 1012 and forward of Volume 8

[12] That the evidence of LA falls short of being reliable and trustworthy to the extent that her evidence can be accepted beyond reasonable doubt;

[13] That the learned Regional Magistrate was under the wrong impression that he could not adjudicate the competence of LA again at the end of the trial;

[14] That the learned Regional Magistrate wrongly found that LA gave a clear and graphic description of the sexual activities that took place in respect of what LA and AJ had to do and what the others that were involved did to LA and AJ;

[15] That the learned Regional Magistrate concluded that the object used to penetrate LA was a sex toy, which is not true;

[16] That the learned Regional Magistrate did not deal with the contradictions between the report witness, Ms Estelle Smith and LA;

[17] That the learned Regional Magistrate misdirected himself to find that Dr Lukhozi's evidence is partly corroboration for the evidence of LA;

[18] That the learned Regional Magistrate erred in finding that the evidence of LA during the trial was consistent with her original accusations;

[19] That the impression is created that the learned Regional Magistrate misdirected himself in that section 28(2) of the Constitution, Act 108 of 1996 (hereinafter referred to as the Constitution), altered the onus of proof where a child is the complainant in a sexual misconduct case;

[20] That the learned Regional Magistrate erred in finding that police witnesses were not confronted with the version of the 2nd Appellant that the police only took photos after they had thrown the clothes out of the cupboards;

[21] That the learned Regional Magistrate erred in accepting the evidence of Dr du Toit as admissible, that her report is admitted by agreement and by accepting her evidence;

[22] That the learned Regional Magistrate erred in relying on the opinions of the police officers that the children were abused, while they were not experts in that field;

[23] That the learned Regional Magistrate wrongly convicted the Appellants of a contravention of section 305(4) of the Children's Act;

[24] That the learned Regional Magistrate erred in finding that the state's evidence proved deliberate neglect;

[25] That the learned Regional Magistrate erred in finding that the evidence of the Appellants and their witnesses must be rejected because he accepted the evidence of the State;

[26] It is apparent from the papers and the address on behalf of the Appellants in this court, that they will not pursue the appeal against the sentences imposed, should the conviction be confirmed.

The evidence

[27] The allegations are that the Appellants, committed these horrendous crimes in 2014 against their biological children, LA and AJ, while the children were respectively five and eight years' old.

[28] The Appellants pleaded not guilty and elected to remain silent.

[29] The only witness called by the State that gave direct evidence about counts 1 to 7 (all relating to crimes of a sexual or pornographic nature) was LA.

[30] LA gave her evidence with the assistance of an intermediary who was appointed in terms of section 170A of the Criminal Procedure Act, Act 51 of 1977 (hereinafter referred to as the CPA). The provisions of section 170A(3) of the CPA were applied, resulting in LA not being exposed to the Court room and the proceedings inside the Court room. She was in an environment that is child friendly in the company of an intermediary.

[31] LA was questioned by the learned Regional Magistrate and thereafter admonished to speak the truth in terms of section 164 of the CPA.

[32] LA referred to the Appellants as "oom" and "tannie" and testified that they are her "Ma en Pa". "Oom" is the 1st Appellant and "Tannie" is the 2nd Appellant. She referred to Estelle Smith as her "mamma". She testified that her surname is Smith, and she does not know the surname of the Appellants.

[33] LA testified that she lived in the house with the 1st and 2nd Appellants, AJ and two other people.

[34] She testified that the 1st Appellant told her to suck his “tollie” and to rub it up and down and to swallow the “piepie”. It tasted like bad jelly. Thereafter she testified that the 2nd Appellant told her to suck the “tollie” of the 1st Appellant and that the 2nd Appellant showed her how to suck it.

[35] She testified that the 1st Appellant put a stick into her “parrakoekie/piepieplek” and then all the blood came out of her “piepieplek”. She later testified that her parrakoekie is the place she uses to urinate. She described it as a long brown stick with a sharp end that he got from a tree next to the house. The Court estimated the length indicated by the complainant as between 15- to 20 cm. During this incident the 2nd Appellant, AJ and the friends of the 1st Appellant were present.

[36] She testified that herself and AJ had to take off their clothes and AJ had to lie on top of her while she had to shake (on the bed of the 1st Appellant).

[37] She testified that the 1st Appellant would press her hard on her shoulders so that she could not get up, and then he would put a stick in her bum’s hole. It was painful.

[38] She testified that she was at the doctor with the 1st Appellant where the doctor looked at her “parrakoekie” while the 1st Appellant took photos.

[39] Thereafter she said that she had to lie on the bed, with AJ on top of her while the 1st Appellant took photos with a camera and with a phone. This happened many times.

[40] Thereafter she testified that she had to dance while she lay naked when the 1st Appellant took photos of her. This happened in the presence of AJ and the 2nd Appellant. AJ's "verkeerde plekkie" was also photographed while he was naked and had to dance. She testified that the 1st Appellant put the photos on a cd and gave it to his friends.

[41] She testified that she had to lick and suck the "piepieplek" of the 2nd Appellant while the 1st Appellant watched.

[42] She testified that AJ also did nasty things to her by putting his "tollie" into her mouth and her bums and she also had to suck it and rub it. This was done on the instructions of the two Appellants.

[43] When LA was asked how it happened that she left her home, she answered that they found a lady near where Aunt M stayed. She testified that they were found alongside the road where they were walking. They walked away as they did not want to live in the house of the Appellants anymore. She was twice asked why they decided to go away, and twice she answered "Daarso in ons kamer". The third time the question was repeated, she answered that the 1st Appellant said that they must "fuck off and leave the house" and the 2nd Appellant said "fokkof and kaffermeid" to herself and AJ. She and AJ then packed goods and walk away as they were sworn at. They slept under a tree and ate hamburgers. They bought the hamburgers at the hamburger place.

[44] She testified that there was no food in the house, and no one looked after her during the day.

[45] Exhibit C, consisting of page 1 (photos 1 – 4), page 2 (photos 7 – 10) and page 6 (photos 19 – 22) was shown to the complainant. She testified that she could remember that the photos on page 1 were taken by the Appellants when she had to stand nicely and smile. She identified AJ on page 3. On page 6 she identified a red suitcase with her shoes and dress inside, as well as Mc Donalds and a shirt. She and AJ packed the suitcase, closed it, and walked away.

[46] Exhibit D photos 5 and 6 are photos of the house that she lived in with the Appellants and others, and a tree. Photo 10 is a photo of the place they slept at, watched television, and got food. Directly thereafter she stated that there was no food in the house, no fridge, and no electricity.

[47] The witness was asked numerous times to tell the Court what happened in the room. The intermediary informed the court that LA was emotional. Upon asking LA for a fifth time what happened in that room, she responded that the 1st Appellant and R bought medicine that they put into a thing and injected it into her arm, and her legs. LA later described the apparatus used to inject the medicine. She testified that it was painful when the medicine was injected. The learned Regional Magistrate tried to establish what the effect of the injected medicine was, but she continued to testify that blood came out, it was painful and made her feel bad.

[48] LA was again asked what she had to do in that room, whereupon she responded that she had to clean the house as it was dirty.

[49] LA identified photos 18 to 20 as photos of the room in which she slept with AJ. She pointed out the bed on which she slept. The intermediary described the bed in the photo as a wooden bed without a mattress full of toys.

[50] LA identified photos 31 and 32 as photos of the room of the Appellants. She was asked by the prosecutor if she could tell them one thing that happened in that room. LA did not respond to the question and was asked by the intermediary if she should help her and again asked if she could tell us one thing that happened in that room, whereupon the learned Regional Magistrate intervened and said that they could leave it there.

[51] During cross examination of LA, the defense attorney put it to her that they did not run away from home on the day in question, but that they went to buy a “braaiertjie” for the 1st Appellant. It was put to her that the 2nd Appellant went searching for them and she phoned the police. The witness denied the truth of the statements.

[52] It was put to LA that nothing of what she spoke of, happened to her, that she was not penetrated with a stick, fingers, or a penis and that she did not have to lick anyone. She responded that he was lying.

[53] She testified that everything happened on one day, long before she and AJ ran away.

[54] She testified that AJ was present when these things happened to her.

[55] She testified that when photos were taken of her while she was naked, they would put a sticker on, which they would take off and then you see a naked girl.

[56] She was confronted with the fact that the police found no photos of naked children on the computers of the 1st Appellant to which she responded that he was lying.

[57] She confirmed that she and AJ bought hamburgers at Mc Donalds and on a question where they got the money from to buy the hamburgers, she responded “Ons het geld gekry op by ‘n masjien ding sien hulle nommers, dan is daar ‘n rooie en ‘n groene, hulle tik net die nommers in”.

[58] It was put to her that there is no Mc Donalds close to where they lived, and that the nearest Mc Donalds is very far from their home. She denied it.

[59] During further examination by the learned Regional Magistrate, LA testified that she does not know how long a day is, that they walked for more than a day when they ran away from home.

[60] Mrs. Smith testified that she became the foster parent of LA on 5 September 2014, which is a month after the children were found during the day near a park. According to her, LA was neglected, nervous, and very scared.

[61] She testified that at different stages, LA opened and made reports to her. The first report was about a week after she was placed in her care. At that stage, LA told her that “Pa W...” hurt her by bighting her on her “verkeerde plekkie” and by urinating on her. He took off her clothes and made her lie on her stomach on the bed in the room. He pushed a stick into her from behind. During the incident she was home alone with the 1st Appellant. He also put her hand on his “verkeerde plekkie” and with his hand over her hand made frontwards and backwards movements to stimulate him. He also put his penis in her mouth and told her to drink it and not spit it out. She also told her that she wiped up the blood that went down to her feet.

[62] A few days or a few weeks later, LA made a second report to her. By then she referred to her mother as “Tannie Z...”. She reported that the 2nd Appellant told Rouche to insert her fingers into the complainant while the 2nd Appellant took photographs. They did the same to another boy child, hereinafter referred to as A. The people in the lounge were laughing. She further stated that Bianca also inserted her fingers into her, and that A was crying. She further reported that the 1st Appellant inserted his “piepieplek” into A and the blood was flowing. She further reported that both Rouche and Bianca took photos with their cellphones. LA was very emotional and was crying when she made the report. She is not sure if she was told anything else as she was praying that the gruesome information that she received must vanish from her head.

[63] Mrs. Smith testified that at a later stage LA also told her that A’s father drove with the 1st Appellant to buy medicine. Upon their return they injected her first into three places and thereafter they also injected AJ and A. Then the 1st Appellant hurt A until the blood was flowing, and A’s father hurt her until the blood flowed.

[64] Mrs. Smith also testified that LA reported to her that on some days, the 2nd Appellant would open the pants of the 1st Appellant, take out his penis and suck it, and then instruct her to also suck it. She also reported that A would stand in front of the 1st Appellant, he would bend forward, and the 1st Appellant would insert a stick into him. She further reported that the 2nd Appellant would let her undress and lie on the floor on her back. The 1st Appellant would also stiffen the “verkeerde plekkie” of A with a stick and make him lie on top of the complainant and assist him to put his “tollie” in her “verkeerde plekkie” while either of the 1st and 2nd Appellant would take photos. She further reported to her that the 1st

Appellant and the father of A would put cream or ointment on the children's arms and hands and then push it into the private parts of the women.

[65] In respect of the stick that the victim reported on, Mrs. Smith testified that LA used the word stick, and she later described the stick as a brown object about the length of half a ruler and about as thick as an R5-coin. It had an on/off button and the stick shook.

[66] The witness was asked if she could deduce if there were more than one stick and the witness responded "Nee, daar was 'n klomp stokke in die laai en haar pa se hand wapen".

[67] During cross examination Mrs. Smith disputed the version of LA that she could not remember her surname.

[68] Mrs. Smith testified during cross examination that LA was examined by a doctor after the children were found by the police wandering in town. She further testified "... *Hulle het toe... gese daar was 'n positiewe, sy was by die distriksgeneesheer, dit was positief.*".

[69] Mrs. Smith was confronted with the fact that LA testified that all that happened to her, happened in the presence of both Appellants, A others.

[70] When Mrs. Smith was asked if AJ would be able to confirm what the complainant said, she responded "... *en hulle het hom klaar beïnvloed met hulle Sondag kuiertjies by hom.*".

[71] Mrs. Smith testified that she was informed by LA that the 1st Appellant loaded the photos onto the computer and it was then transferred onto a CD, which cd's were given to R and the father of A.

[72] Mrs. Smith tendered the evidence that she was informed that LA was placed in her care as the guardian at the Place of Safety battled to keep AJ out of the bed of LA.

[73] Mrs. Smith admitted that she searched on Facebook to get more details of the family of the other girl as she deemed it important to have that girl also removed from her home. Once she succeeded in tracing the friends of the 1st Appellant on Facebook, she asked LA to point out the father of A on photos on the Facebook profile of the 1st Appellant, which LA then did.

[74] Mrs. van Schalkwyk, who is a member of CPF, testified that on 19 August 2014 at about 08h56 she responded to a radio request. She arrived at an open field where she found a silver BMW motor vehicle and saw a boy running. She approached the boy. The boy had a suitcase and a wallet with him. The boy was scared. The remainder of her evidence in respect of what the boy told her, was provisionally admitted on the request of the prosecutor. As AJ was not called to testify, the evidence of what he told Ms van Schalkwyk remains hearsay and inadmissible. A little girl was also found, and the two children were transported to the police station. The girl clung to another lady that arrived on the scene. At the police station the children were given food. They were hungry. She identified the photos in Exhibit C and confirmed that the children that she saw on the day in question were LA and AJ.

[75] It was put to Mrs. van Schalkwyk that the Appellants lived with their children in a house, which is a block or two blocks from where the children were found. The witness confirmed that the house is close to the place where the children were found.

[76] It was put to the witness that when the Appellants woke up the morning, they discovered that the children were not home, and that the wallet of the 1st Appellant is missing.

[77] Mrs. van Schalkwyk confirmed that there is no Mc Donalds close to the place where the children were found. They had to drive to buy food for the children.

[78] Mr. Sarel Venter's evidence did not take the matter any further.

[79] Warrant Officer van Dyk testified that he was on duty when a boy and his younger sister were brought to the police station. The boy had a schoolbag of a local primary school with him and a wallet, and the girl had a vanity case containing a few pieces of clothing. The children seemed neglected. He motivated his observation by saying that it was winter, and they were bare feet, the clothing seemed battered, and the children appeared to be dirty. He spoke to them, and they could not give their residential address to him.

[80] He opened the wallet and found an R200-note and the driver's license of the father containing his identity number. He succeeded in tracing the address of the parents.

[81] He was in the company of Cst Payne and requested Cst Payne to search for the mother of the children, who according to people in the vicinity was on the streets looking for her children, while he went to the residence of the parents.

[82] He gained access to the premises, by opening the unlocked gate and entering the unlocked house at the kitchen. There was no one inside the house and he exited the house and waited until Cst Payne arrived with the mother of the children, who is the 2nd Appellant. She also seemed neglected, and he observed that she was nervous. She told him that they (herself and the father of the children) were searching for the children.

[83] The 2nd Appellant granted him permission to enter the house.

[84] During his investigation at the parental house, the 2nd Appellant's urine was tested, and it tested positive for marijuana and CAT. The evidence relating to the discovery of the CAT residue and the marijuana will not be canvassed further as the conviction on count 11 is not contested.

[85] He arrested the 2nd Appellant on a charge of child neglect and obtained her permission to search the house. The house was untidy and dirty.

[86] He discovered four pornographic videos on the top shelf of the father's cupboard and a box containing sex toys at the shoes.

[87] At some stage Cst Payne left the house to pick up the 1st Appellant. Upon their return he arrested the 1st Appellant for child neglect and the possession of drugs.

[88] He found hard drives being scattered. The 1st Appellant informed him that he repairs computers and informed him that the hard drives contain pornographic material.

[89] Upon the arrival of the photographer, he pointed out to the photographer what to photograph. The witness identified Exhibit D and gave a description of each of the photos contained therein.

[90] He perceived the room of the girl to be untidy, with no sheets on the bed and a heap of blankets on the bed. There was a sponge mattress against the wall. It was not clean.

[91] The room of the boy was battered. There were no sheets on the bed and a blue blanket served as a sheet. The cupboard was untidy.

[92] Photo 33 depicts the untidy room of the Appellants. Photos were taken of the sex toys, the pornographic videos and the drugs and drug residue discovered.

[93] He also confirmed what is depicted in Exhibit C.

[94] During cross examination he confirmed that there was food in the house.

[95] He confirmed that it is not illegal to possess sex toys, sex games and adult pornographic material. He seized these objects on the instructions of Captain de Jager.

[96] It was put to him that no child pornography was found on any of the cellphones or hard drives that were seized by the police. He could not comment on the statement.

[97] He denied a statement that the house was untidy but not dirty.

[98] He admitted that the clothes and other goods were taken out of the cupboards during the search.

[99] He could not deny the version of the 2nd Appellant that she had done washing the previous day and still would have covered the beds, but due to the chaos the morning it was not yet done.

[100] It was put to Warrant Officer van Dyk that the Appellants were in the process of moving because the owner of the property cut off the electricity. He could not deny the statement.

[101] He denied a statement by the defense that the sex toys and drugs were on the top shelf of the cupboard. He testified that the sex toys were between the shoes and the empty bag and the plate with the straw were found on the second shelf from the bottom.

[102] During questions by the learned Regional Magistrate, he was asked if the description that he gave of these two children fit the description of children that had just been playing and got dirty, or did it fit the description of neglected children. He responded that it appeared to him that the children were neglected.

[103] He opined that the Appellants were not in the process of moving, because he did not find clothes and other goods lying around, he found wires and hard drives lying around. He did not find any indication that they were busy packing to move.

[104] Cst Payne testified that on 19 August 2014 he was in the company of Warrant Officer van Dyk when he received information of a lady walking in the street. He found her and enquired if she was searching for her children. She confirmed. He took her back to her house. He later also fetched the father of the children.

[105] Cst Payne described the house as untidy and as if the house was cleaned weeks ago. The children's beds were not made, dirty clothes were lying around throughout the house. There were boxes with goods everywhere. The bathroom and kitchen were dirty, and the dishes had not been washed. He found a half a loaf of bread and jam and a bottle of beer. He described it as dire circumstances.

[106] During cross examination it was put to him that the Appellants bought food daily and that they still had to go and buy food the day. He could not comment on the statement.

[107] He also denied knowledge of whether the Appellants were in the process of moving.

[108] He admitted that the contents of the cupboards were removed from the cupboards before the photos were taken.

[109] Ms Strauss, who is the chief executive officer of the Sinoville Crisis Centre, gave evidence which did not take the matter any further in terms of the issues to be considered by this Court. The only relevant evidence is the statement that was made to her by the defense on behalf of the Appellants that the 1st Appellant phoned the police on the morning of the incident, informing the police that they are searching for their children that went missing. She responded that she had no

knowledge of such a call, but she did enquire if any children were reported missing as the children were found wandering around and she was informed that there were no missing children reports. This evidence of Mrs. Strauss is hearsay and inadmissible.

[110] Mrs. von Benecke gave evidence of the photographs that she took of LA and AJ on the day in question. Some of the photos were already handed in by mutual agreement, but the defense denied the admissibility of some of the photos on the unfounded basis that the witness received no training to take photos. The learned Regional Magistrate questioned the witness, who responded that the photos reflected in Exhibit C are exactly the picture she saw of which she took a photograph. She saw the children with marks, dirty feet and in a neglected state. She took photographs of the marks, the dirty feet, the items they had with them and the food that the community bought them later. She took photographs of their backs, chest, upper legs, and stomachs.

[111] Further photographs were subsequently handed in and formed part of Exhibit C.

[112] Dr Lukhozi was called as a state witness. He is a qualified medical doctor who was employed at the Mamelodi Thuthuzela Crisis Centre on 19 August 2014. On the said date he did a medical examination on LA and AJ.

[113] In respect of LA, he observed her clothes as clean, and her weight was less than 95% of the girls her age. He observed no injuries to her.

[114] He continued with a gynecological examination and established that she was not sexually mature and had not yet started producing physical changes due to

hormones of estragon. He observed no injuries to the clitoris, urethral orifice, labia, posterior fourchette and fossa navicularis. The hymen displayed a 3mm opening with no swellings, bumps, or clefts. There were no fresh tears, bruises, or bleeding. There were no injuries to the perineum. He concluded that the genital examination was normal with no injuries or abnormalities.

[115] The 3mm opening of the hymen is normal.

[116] During the anal examination he found a fissure or crack, which was not fresh. He found no abrasions nor scars and no further tears, bruising, swellings, signs of dilatation or fondling or cupping or any discharge.

[117] He concluded that the fissure on the skin does not produce conclusive evidence of penetration however it is suspicious of penetration.

[118] Dr Lukhozi also did a medical examination of AJ and found his height and weight to be age appropriate. He also found his clothes to be clean.

[119] AJ had a 4 cm abrasion on the back of his left thigh that was healing. AJ informed him that he was scratched by a tiger that attacked him the day before. He also had a non-specific bruise on the left knee and healed scars on the neck which he thought were non-specific.

[120] During the anal examination of AJ, he found no injuries, scars, bruises, abrasions, cracks, fissures, fondling, abnormalities, discharges, or cupping. He found good hygiene. He also found no signs of injury during the male genital examination.

[121] Dr Lukhozi testified that his finding with regards to the injuries to Andy is that he cannot give a specific manner of causation.

[122] Dr Lukhozi responded to the version of LA, namely that at one instance she bled so profusely from her vagina that the blood went down to the ground, that the absence of injuries does not rule out penetration, however as there is no cleft on the hymen, it means that the hymen is not torn, and the bleeding could not have been from the hymen.

[123] Dr Lukhozi repeated that the fissure detected during the anal examination is nonspecific, meaning that although it raises suspicion of penetration, fissure is not only caused by penetration.

[124] Dr du Toit was called by the State. She has a doctorate degree in criminology which she obtained from the University of Pretoria. She testified that she assessed AJ on request of the prosecutor with the view of explaining the contradictions between his two statements and to establish, if possible, whether the alleged sexual crimes were committed against him.

[125] Her assessments took place from February 2016 to March 2016.

[126] Her report was received into the record as Exhibit M.

[127] It was put to the witness that her report is not disputed by the defense.

[128] She recommended that AJ should not testify at the trial as he suffers from complex trauma and had a dissociative reaction as a result thereof. During her

assessment, AJ simply refused to answer certain questions, denied that incidents happened and so forth.

[129] She had access to other assessments done on AJ and she clearly relied on an assessment of a Dr Corrie Schutte who found that AJ was physically abused and at stages had no food to eat other than bread. She also had access to the statement of LA.

[130] She gave an opinion that AJ did not give any information of any wrongdoings due to the trauma that he experienced which caused him to block the experiences from his brain.

[131] During cross examination by the defense, it was put to the witness that she merely has an opinion on whether AJ was sexually violated. She denied it.

[132] The witness admitted that AJ denied that any sexual offences were committed against him but testified that collateral information to which she had access, and his body language and emotions proved the contrary.

[133] It was put to the witness that the defense agrees that AJ cannot testify in the case, but not for the reasons advanced by the witness. It was put to the witness that AJ made a statement to the police that nothing happened to him. She subsequently testified that she is of the opinion that there is too much evidence during the assessment to show that Andy was physically and sexually abused.

[134] That concluded the evidence on behalf of the State.

[135] The defense brought an application in terms of section 174 of the Criminal Procedure Act, Act 51 of 1977 for the discharge of the Appellants on all the counts, except count 11, which application was opposed by the State in respect of counts 1 to 8.

[136] The application was granted on counts 9 and 10 and dismissed on all the other counts by the learned Regional Magistrate.

[137] At that stage, the Appellants terminated the mandate of their legal representative, and appointed Mr. Moldenhauer, who concluded the trial and represented the Appellants in the appeal.

[138] Numerous applications were brought on behalf of the Appellants at that stage, including the record to be provided at State expense, the recalling of three state witnesses for further cross examination and the provisions of the hard drives that were confiscated by the State.

[139] Although the State originally alleged that the hard drives went missing and could not be found, it was subsequently discovered and handed to the defense. The further applications by the defense were both dismissed by the learned Regional Magistrate.

[140] The Appellants continued to present their cases. Both the Appellants testified under oath and the defense also called numerous witnesses on their behalf.

[141] The 1st Appellant testified under oath that he bought into a business of a Mr Smit. Part of his remuneration in terms of their agreement was that Mr. Smit would pay the rent of the house where they resided at the time of their arrest, and

he would further be paid R 9 000 per month. Mr. Smit failed to pay the rent of the house, which caused the owner of the property to remove the prepaid electricity box about three weeks before their arrest. They had no electricity at their residence ever since. They agreed with Mr. Smit that Mr. Smit would pawn the bakkie that was used by the 1st Appellant to provide him with R20, 000.00 to enable him to move his family. Although Mr. Smit by the time of their arrest already pawned the vehicle, he did not give them any money to enable the Appellants to move. He pointed out photo 9 of Exhibit D as a photo depicting parts of computers that were already being packed away by them in preparation of their move.

[142] He testified that they had food every day, which they bought daily.

[143] Prior to their arrest R and B lived with them on two occasions for a period of about two to three months. They last lived with them in about March of the year of their arrest.

[144] On the evening before their arrest, they had chips and cold meat for supper. They bought food daily because they had no electricity and could not store food in a fridge.

[145] The children went to sleep at 20h00, each in their own bed. He and the 2nd Appellant went to bed by 21h00. Nothing out of the ordinary happened during that night.

[146] They overslept the next morning, and only woke up at 07h15, because they could charge their phone and set an alarm because they had no electricity.

[147] He testified that the 2nd Appellant got up first and returned to their room saying the kitchen door is open and she could not see the children. They put on the first clothes that they could find and left the house in search of their children without taking proper care of themselves.

[148] They found the gate was open. The gate was difficult to open even for his wife. He does not know how and who opened the gate. They did find fresh broad tracks outside the gate, which he assumed to be tracks of a bakkie.

[149] His first thought was that AJ got onto the bus with his sister.

[150] He immediately phoned Karel the pre-school Centre that was attended by LA on some days of the week to make enquiry if the children were on the bus and he phoned Mr. Smit to hear if a vehicle is available to help them to search for the children. Then he also phoned the police on 10111 and requested them to be on the lookout for two children of 5- and 8 years who got out of the house.

[151] Thereafter he walked the whole route that the bus travelled. At Sinoville Centre he charged his phone for a few minutes. During that time, he was phoned by Mr. Smit who informed him that a social worker phoned him and informed him that they found the children. Just as the call ended a Ms. Heunis phoned him and informed him that the children were found. He was relieved.

[152] Thereafter Cst Payne arrived, he immediately entered the car, and they went to their home.

[153] Upon arrival at his house, they entered the house through the kitchen door, and he was immediately arrested, and his hands were cuffed behind his back. He was made to sit next to the 2nd Appellant on the sofa. She was crying.

[154] He testified that photographers arrived who took photos of all the goods that the police confiscated. By then all the goods were already thrown out of the cupboards. He identified the photos that were handed in by the State as Exhibit D as photos taken by these photographers after their arrest.

[155] They were informed that the children were at a crisis Centre. They were only informed that they were arrested for child neglect and the possession of dagga. Comments were made by Cst Payne and Mr. van Dyk that his wife was very skinny. They were also told that they will ensure that they never see their children again.

[156] He admitted that the dagga found in his cupboard belonged to him. He admitted to smoking dagga to calm his nerves due to the financial dire straits they were forced in by Mr. Smit.

[157] He also admitted that they were in possession of thirteen plastic bags containing residue of CAT. He admitted that both he and the 2nd Appellant used CAT occasionally when having a braai with school friends. The children would not be present on these occasions but would be visiting the brother of the 2nd Appellant or his own uncle Danie and aunt Rita Stassen.

[158] He testified that he never exposed his children to their use of drugs. He did not even smoke in the presence of his children.

[159] They were released on bail about three weeks after their arrest.

[160] They only became aware of the other charges of rape and child pornography after a newspaper article appeared in June 2015. They were never informed of these charges by the police.

[161] LA was a loveable child. When he returned from work, she would run into his arms and AJ would climb onto his leg. He would then play with them.

[162] He testified that the word “parrakoekie” was never used in their house, they used the word “koekeloeks” when referring to the private part of LA.

[163] He would hear the 2nd Appellant using the word when LA was bathed. He was never present while she bathed. He did not even assist in changing her nappies as she was a girl.

[164] He denied any incident with a stick and denied that there was a tree with branches low enough to pick a branch. They only had a banana tree on the premises. He pointed out the banana tree in photos 1 and 2 of Exhibit D.

[165] He denied that any sexual abuse took place in which he and the 2nd Appellant participated.

[166] He denied that he penetrated LA with a stick and that she bled profusely. He responded that she would then have had to be taken to a hospital. He is unaware that LA bled from her private parts at any stage.

[167] He denied that nude photos were taken of LA. He only admitted that the 2nd Appellant took one photo of LA where she stood in the bath with her back to the

camera. She took the photo to show his parents how long LA's hair was. There was no other intention with the photo than to show his parents the length of LA's hair.

[168] The police confiscated all their sex games that they found in the cupboard, three adult pornography DVD's and about seven hard drives. The hard drives were given back to them. He looked at the contents of the hard drives. Two hard drives did not work. One hard drive had all their information on, but all their photos and videos were removed before it was handed back to them. These photos and videos were taken while they were on holiday or where the children played.

[169] During his evidence, the defense handed in Exhibit P, that had been in possession of the State all the way but not presented to the Court during the State's case. Exhibit P is a report by a social worker in the employment of the Films and Publication Board, who examined three of the hard drives confiscated in this case on 2- and 3 December 2014 and found it not to contain child pornography. She compiled a report on 16 February 2015 noting her findings. It needs to be mentioned, that although no conviction followed in respect of the producing of child pornography, it is appalling to notice that the State elected to prosecute the two Appellants of said charge and formally put the charge of contravening section 24 of Act 65 of 1996 to the two Appellants on 11 February 2016 while being well aware of the fact that the evidence at their disposal did not prove that the Appellants committed such a crime. The prosecution of the Appellants on count 7 as well as the fact that the State withheld information contained in Exhibit P from the Court, seems to have been done maliciously. It is further extremely concerning that a newspaper article was posted in June 2015 mentioning the charge of child pornography against the Appellants while it was well known to the police and the

prosecution by February 2015 that there was no evidence of the production of child pornography.

[170] He denied that any sexual acts occurred between AJ and LA in their presence.

[171] He denied that they chased their children away. He denied that there was any argument between them and the children on the night before they disappeared.

[172] He denied that he ever took LA to the doctor or that he was present when social services or the police took LA to the doctor.

[173] He denied that he ever injected the complainant.

[174] He knows A. A, together with his parents would visit them about twice or thrice a year. He has no more contact with the couple as they moved to Mozambique.

[175] He denied that R, B or the parents of A participated in sexual misconduct against the children.

[176] He denied that he possessed any firearm.

[177] He testified that LA had bedlinen on her bed and she was acquainted with bed linen. On the day of their arrest the linen was not yet put back onto the beds as it had been washed the day before and the 2nd Appellant still had to make the beds.

[178] He testified that they often bought their children take away meals with toys.

[179] He testified that both him and the 2nd Appellant had lost weight because of their circumstances, but they were not neglected. He could understand if the police said that they were neglected because they were skinny due to the use of CAT. CAT had the effect that you would eat less regularly. They would use CAT on weekends per occasion.

[180] He testified that AJ was placed back into their care by the social worker from about February- to May 2015. Thereafter he was placed in a children's home where they used to visit him until they were prohibited from visiting him by the Court. He denied that they manipulated, intimidated, or threatened AJ at any stage or influenced him not to speak about what happened in their home. He can recall that AJ asked him not to die again. AJ was very happy to be back home. At that stage they were not yet aware that they are charged with crimes such as rape.

[181] He denied the evidence of Dr du Toit that he never played with AJ.

[182] He testified that there was about R700, his driver's license and a few cards in his wallet before the wallet was found in possession of AJ. When he received the wallet back, it contained no cash. He was informed by Capt. de Jager that the R200 in the wallet was taken to contribute to the children's care.

[183] He denied any child neglect. He testified that they were not rich, but had sufficient means to live, have the children in school, buy clothes etc. The children were cared for to the best of their ability and with love.

[184] During cross examination by the prosecutor, he testified that he had not received a salary for about 6 weeks prior their arrest. He would sell his tools for them to survive. He knew that they would move but could not move before Mr.

Smit had given him the R20 000 to enable him to move. He denied the truth of the police evidence that there were no signs that they were busy preparing to move. He referred the prosecutor to the photos that were handed in, which photos depicted packed boxes.

[185] He was asked how he could afford to buy drugs if he received no income. He responded that he bought the drugs when he sold scrap metal, but dagga is cheap, and he would not spend a lot of money on buying dagga. They spent about R200 per week on CAT as a bag would cost about R200 per bag.

[186] He testified that the police moved items before photographing it, for instance the bong was moved from between the bed and the bedside table to an open spot next to the bathroom door, to be photographed.

[187] The night before the children went missing, he locked the main gate with a big Viro lock, the key of which, was attached to the house key, which was kept either in the kitchen door or on the microwave oven. The next morning the kitchen door was open, the gate was open, and the keys were missing. The Viro lock was still by the gate.

[188] Usually, the 2nd Appellant would wake the children in the morning and get them ready for school, but on the morning in question the children were not in their beds. He did not hear the floor planks, the door being opened, the gate being opened or the dog barking.

[189] He does not know how the children opened the gate, but he believes that if AJ tried very hard, he would have been able to open the gate. He agreed that in those circumstances AJ would have intentionally wanted to open the gate to go out.

But he also believes that it is possible that Mr. Smit was there the morning, and that AJ might have given him the key to open the gate.

[190] He testified that the children used to pack stuff in suitcases and pretend to have a picnic outside.

[191] He identified the “mondfluitjie” on photos 27 and 28 as the 2nd Appellant’s deceased uncle’s “mondfluitjie”. He cannot remember where they used to keep it. He testified that he was not even aware that the children had taken the “mondfluitjie” as well.

[192] He admitted a statement by the prosecutor that to take the wallet and the “mondfluitjie” was a strange combination.

[193] He denied a statement by the prosecutor that he had chased the children away and he denied that AJ did not know their street address. He denied that the children could have slept in the bushes the previous night.

[194] He was asked if it is his version that the children ran away from a loving home without any reason. He responded that he doubts whether the children ran away and stated that children can say anything if they are caught being naughty. He believes that the children were playing in the park and took off their shoes to play.

[195] He testified that he could understand that the children were scared when they were discovered by unknown people approaching them.

[196] He testified that they had more friends than B and R and the parents of A. He does not know why LA implicated these friends as co-perpetrators.

[197] He denied the evidence of LA that he would take photos of her dancing naked, or photos of her “parrakoekie” and buttocks. He stated that if that was true, it would have been discovered on the hard drives. He denied putting photos on CD’s and giving it to friends.

[198] He stated that the vocabulary that was used by LA during her testimony is not vocabulary that she knew of. They never used words like “parrakoekie”. They never did anything sexually in front of the children. He does not know whose words they were, but they were not words used in their home. He denied that LA could have seen the contents of their adult pornography material.

[199] It was put to the 1st Appellant that the day after their arrest, LA made the first statement in which she stated that photos were taken of her while she was naked. He responded that LA could not yet speak full sentences at that stage, and she did not have the vocabulary or knew the word “parrakoekie”. He testified that it is possible that somebody told her to make the allegations. He could not identify who would have done that, but somebody did it. It was put to the 1st Appellant that it is highly improbable that a child of that young age could maintain a lie for such a long period (since the day after the arrest on 20 August 2015 until she gave evidence on 1 February 2016). He responded that he does not know how long a person can maintain a lie, he does not know what she was told and what her circumstances are, whether maybe she has many toys, but he does not know where she got the words from. It was later put to him that in this very first statement LA

stated that she does not want to live with her parents anymore as they scold them and chased them away. He denied it and responded that it was not her words.

[200] Their mode of discipline with AJ was to take away the computer or fold a newspaper and give him two smacks or sit down and talk to him. It was not yet necessary to discipline LA. He never gave the children a hiding.

[201] He testified that he had a good relationship with AJ. He denied the truth of Dr du Toit's evidence that he did not have a good relationship with AJ and that AJ could not provide her with a single positive action that they did together. He denied her opinion that AJ was a deeply traumatized child. He responded that if AJ believed that he was dead, who knows what LA was told about them. If there were problems with LA, she surely would have reported the problems at the creche already.

[202] He testified that the children had no reason to run away from home. It was put to him that it is not the truth, otherwise the children would not have run away. He responded that he does not believe that the children ran away, he believes that the children wanted to go and play in the park. He denied the statement that the children were chased away by the Appellants on the night before they were discovered. He repeated that he did not know how they succeeded in opening the gate.

[203] He agreed that his thought that the children wanted to go and buy him a "braaiertjie" was just his opinion and speculative. He had that opinion as AJ once mentioned that he wanted to buy him the "braaiertjie" at a shop that they drove past. The shop was about 5 km from their home.

[204] B and R were friends of the Appellants and moved out of their home approximately March 2014. They visited once or twice after they moved out, but since their arrest, they have not had contact with them again. He admitted that they had other friends visiting them as well and that his children loved both B and R. He could not explain why LA in these circumstances made the allegations against B and R but was adamant that her allegations were false.

[205] He denied that he took photos of the complainant while she was naked, lying on the bed and dancing. He testified that the photos that he took of the children as they grew up, were taken with the cellphone and transferred to the computer. He stated that if LA was telling the truth, the naked photos of LA would have been discovered on the computer. He denied transferring these photos onto CD's and giving it to friends. He testified that LA knew of CD's as they watched movies and played games with CD's.

[206] He testified that he believed that LA would be very glad to see him and jump into his arms. They had a very good relationship. He does not believe what is said. It was put to him that the children gave the information to the State. He responded that it is not true information. He stated that LA is lying. The words used by her are not her words, she used words that she did not know in their home. He said that he did not know whose words they were, but someone had to teach her those things.

[207] He testified that the children were first placed in safe care together, and thereafter split due to an incident. At that stage LA was placed in the care of Ms. Smit and AJ was placed with his nephew.

[208] The children were never exposed to sexual deeds or to the pornographic material that the Appellants possessed.

[209] It was put to him that LA made her first statement on the day after their arrest in which she already mentioned the photos that the Appellants took of her while she was naked. He responded that it is not the truth that he took naked photos of her. He continued that at that stage LA just started to make sentences and the words used were unknown to her. They never used the word “parrakoekie”. He testified that LA at some stage alleged that Mr. Smit molested her and thereafter again said that he (the 1st Appellant) molested her. He testified that she was definitely told by someone what to say. He repeatedly stated that he does not know who told her what to say or why she says what she says but denied that her allegations are true.

[210] He stated that he firmly believes that the ordeal could have been resolved in an amicable manner. The police believed that there was child pornography while they took all the hard drives, and both the Appellants gave their continuous full cooperation all the time.

[211] It was put to him that a child of such a young age could not have persisted with such a lie for such a long time, as LA only testified approximately eighteen months after she made her statement. He responded that he has no knowledge of how long a person can continue with a lie, he does not know what her circumstances are, maybe it is very nice, and she has a lot of toys.

[212] He admitted that the only witness in the trial that knew him, was LA.

[213] He testified that Mr. Smit knew the late Capt. de Jager and it is possible that the two of them built this case against him and his wife. It was put to him that this version is highly improbable. He denied the statement and responded that there is a big likelihood that it happened that way.

[214] It was put to him that LA persisted with her version, not only in Court but also in her reporting thereof to Ms. Smit and to the person who took her statement. The defense, rightly so in my opinion, objected to the statement by the prosecutor and argued that the statement is not correct due to the contradictions in the evidence of LA and that of Ms. Smith. Without giving any reasons for his ruling on the objection, the learned Regional Magistrate merely instructed the witness to answer the statement, and as such effectively overruled the objection by the defense.

[215] He denied the truth of LA's version that she had to suck his penis and that it tasted like bad jelly and that the 2nd Appellant showed LA how to do it. He denied that he pushed a stick into her "piepieplek" and responded that if that happened, the child would have had to go to hospital.

[216] He denied that AJ committed deeds with the complainant.

[217] He responded that it is sick to believe that he instructed LA to suck the private part of the 2nd Appellant.

[218] He responded that AJ should be asked if it is true that LA had to suck him.

[219] He testified that LA told the truth when she said that a friend by the name of A also visited them.

[220] The conclusion of Dr Lukhosi, who examined LA on the day that the children were removed from their care (that the anal injury does not produce conclusive evidence of penetration, however, is suspicious of previous anal penetration) was put to the 1st Appellant, who denied the conclusion.

[221] It was put to him that none of the state witnesses or any party to these proceedings had any reason to fabricate such an extensive false version against them. He responded that he does not agree as people form perceptions about others, if they observe you, you do not look like the standard of what they would like to see, and then they form their own opinion about what you do at home.

[222] He denied a statement that himself, with or without the 2nd Appellant committed these deeds and that they did not care for the children as they should.

[223] During re-examination of the 1st Appellant, he testified that the police confiscated his cellphone and could have obtained a record of the contents.

[224] Certain aspects of LA's first statement were put to him. For instance, LA stated that they lived in a small house. The witness denied it and confirmed that the submitted photos reflect the house. LA also stated that one day while she and her brother played with a ball, her mother and father called them and told them to pack their clothes and go away and never return. He denied it. She stated that her father slammed close the door and the gate, and they slept under a tree. He denied the statement.

[225] He testified during questions by the learned Regional Magistrate that they had no fixed income in the last days, but he would sell items or repair people's phones or service people's computers for a few rands. He testified that they did

not have an above average lifestyle, but at some stages it went well and sometimes it did not go as well financially.

[226] The second witness in the defense's case was W/O Boshoff. He was stationed at the Serious Electronic Crime Investigations Unit of the SAPS, which unit deals with all child pornography matters in Gauteng. On 13 July 2015 he was tasked to obtain a statement from a child, whose name and surname he could not remember. After he refreshed his memory from his own statement that he made, he confirmed that the child was the 9-years old AJ. It is clear from his evidence that he can recall little if any detail of the day that he took the statement. He gave his opinion, based on his years of experience working in that field, that that child, AJ, would be able to testify in a trial.

[227] The 2nd Appellant testified under oath that she is married to the 1st Appellant. She listened to the evidence of the 1st Appellant and agrees with his evidence. She testified that she occasionally also used dagga with the 1st Appellant since the passing of her mother. The effect of the dagga was to calm her down. She also used CAT. She admitted that packets containing residue of CAT were found in their house. She was too scared to throw the empty packets away in the dustbin as they could be discovered by the children or someone else. She hid the empty packets on the top of her wardrobe under her clothes. They used CAT for a period of just over a year and never used it in the presence of the children. They would use CAT when the children went away for a weekend to visit her brother or the aunt of her husband. Sometimes AJ would also sleep over at his friend from school.

[228] She testified that R and B stayed with them for a period of about two to three months prior to their arrest. She does not know their current locations.

[229] She testified that it is extremely sad to hear what LA testified. She does not know where the child got the information from because they love their children. She testified that the evidence of LA is not true. She denied that they molested LA or that the 1st Appellant raped LA.

[230] The night before their arrest, LA was in her bed. That night she saw LA and AJ, sleeping in their beds when she went to the bathroom.

[231] After AJ was removed from their care, he was placed with the nephew of the 1st Appellant, and his wife. When the wife had to go for a heart operation, AJ was placed back in their care in February 2015. AJ was very happy and continuously enquired about his sister. They did not discuss the facts of the case.

[232] She is of the view that the children were not neglected. They were walking through the park and possibly playing in the park, so their feet would be dirty. The children were not neglected, they had toys, clothes, love, and attention. She denied that they did not have food in the house. There was always food, fruit, and sweets. The children had what they wanted.

[233] Although the house might not have been tidy when the police arrived, it was not dirty. She did not yet have the time to wash the dishes or to make the beds as they went searching for their children. The clothes were lying around in the house because the police threw everything out of the cupboards and took photos of the inside of the house after they had thrown out the contents of the cupboards.

[234] She was home all day and took care of the children. It is not true that the 1st Appellant did not play with AJ. AJ received a merit award for mathematics at school while he lived with the nephew of the 1st Appellant.

[235] She denied that they took naked or pornographic pictures of the children. She once took a photo of her daughter from her back in the bath with her wet hair to show how long her hair was. She was sitting down in the bath and not even her buttocks were visible.

[236] During cross examination by the prosecutor, she testified that on the evening before their arrest she bathed the children, spent time together and then she put them to bed. She and the 1st Appellant went to bed about an hour to an hour and a half later. They had no electricity and used candles to see in the dark.

[237] As they had no electricity, they could not charge their phone and could not set an alarm. She woke up at about 07h00, as a bus passed and stood up to wake AJ up for school. She then saw that the children were not in their beds. She woke up the 1st Appellant and informed him that the children were missing.

[238] On her way out to look for the children, she saw that the kitchen door was open, and the gate was open. The gate was made of steel and was heavy and opened and closed with difficulty. It is locked with a chain and a lock.

[239] She went back into the house to put clothes on. The 1st Appellant then called the police, the creche and the school.

[240] She did not have a proper look in the children's rooms before leaving the premises to search for the children because she got a big fright.

[241] As she walked in search of the children she enquired at the shops along the route. No one saw the children.

[242] She does not know how the children left the premises.

[243] The keys of the lock of the gate were usually kept on the microwave oven. The key was not on top of the microwave oven that morning.

[244] She knows that the wallet of the 1st Appellant was also missing, which was also always kept on top of the microwave oven.

[245] She did not use dagga or CAT the night before the children went missing. They last used drugs the weekend before the children left the home.

[246] The park referred to in the evidence is about seven to eight street blocks from their home. The children often walked to the park from their home. They knew the road to the park. She denied the evidence that the children could not tell where their house was.

[247] She denied that the children were chased away and that they slept in the bushes the previous night.

[248] By the time of their arrest, they were on their way to move from the property but could only do so once Mr. Smit gave them money. Mr. Smit promised on a weekly basis that the money would come in the next week. Here and there she already packed a box of goods that were not used often.

[249] She identified the red vanity case on photos 20 to 22 of Exhibit C and the clothes inside the vanity case. She does not know when the children packed the

clothes. She denied that the children planned to go away as they packed the vanity case. She testified that the children had no reason to run away, and they always packed a case with extra clothes if they went away, even if it is only for an hour.

[250] She agreed that the children could have been hungry when they were found as they did not yet have breakfast. She testified that they were used to eating toast.

[251] She testified that the evidence of LA and of other witnesses (that the children were chased away) are all lies.

[252] She believes that LA was told that she does not want to live with her parents again. She believes that LA was foretold by Mrs. Smith because Mrs. Smith stated in a newspaper article that she does not want LA to leave her. She also motivated that the words used by LA, and the things that LA spoke of were unknown to her when she stayed with them. She could not explain how LA then said what she said in her statement that she made in August 2014 before she was placed in the care of Mrs. Smit.

[253] She denied that a window broke in their house or that the children were chased away due to the broken window.

[254] She denied the truth of the allegations made by LA against her and the 1st Appellant.

[255] She denied the evidence of Mrs. Smit that LA had no idea of bed linen. She admitted that the children did not have a fitted sheet and a flat sheet on their beds, but they did have linen on their beds.

[256] There were no problems between B, R and LA and she could explain why LA also implicated B and R in the commission of sexual deeds.

[257] The only reason why she believes that the reason for the children to have left the house, was possibly because AJ wanted to go and buy the “braaiertjie” for the 1st Appellant, is because the wallet of the 1st Appellant was missing.

[258] She has never since her arrest seen LA again.

[259] She testified that the only comment that she could give in respect of the possibility that Mr. Smit was involved in laying the charges is that she heard that Mr. Smit arranged for children of other people to be removed, and she found fresh tracks outside the gate on the day the children went missing. Further she heard that he was in the vicinity when the 1st Appellant called him for help, and he could have helped them to look for the children.

[260] She testified that the children would not have been able to open the gate alone.

[261] It was put to her that none of the witnesses for the state could have benefited from fabricating false charges or to foretell LA. She responded that she does not know how to answer as none of the allegations made by LA are true.

[262] It was put to the witness that the only way in which LA could persist with her version, was if it did happen as LA testified. She again denied that any of the incidents occurred.

[263] During questions by the learned Regional Magistrate, she testified that the name she used for the complainant's private part was "koekeloeks".

[264] She stated that they thought of every possible scenario that could have caused the children to have left the home.

[265] She stated that she does not know for sure who foretold LA, but she was foretold.

[266] The aunt of the 1st Appellant also testified. In 2014 she lived in a garden flat in the premises of the mother of the 1st Appellant. The Appellants used to visit them almost every second weekend in 2014. During those visits the two children, AJ and LA, were healthy, neat, and always clean. She was very close to the children and loved them. LA never discussed any sexual abuse with her. LA never complained about the circumstances at their house. When she visited the home of the Appellants, she always found it to be clean and neat. According to her observations there was always food in the house because the 1st Appellant was employed so she assumes they always had food. She testified that it is a lie that the children were neglected as they were always clean and neat. The Appellants always packed clothes for them in suitcases when they went to visit her. They were never very hungry upon their arrival.

[267] About two weeks after the arrest of the Appellants, the social worker and her mother came to her house and brought AJ to her to live with her. She consented and the arrangements were finalized that AJ would be placed with them. The social worker did not want them to enroll AJ in a school as they said that they did not know how long he would be with them. AJ lived with them for two weeks,

whereafter he was taken away again by Mrs. Heunis because she said their flat was too small.

[268] During the time that AJ lived with them, he was very quiet and enquired a lot about his parents. They used to respond that his parents are working long hours. AJ did not tell them of anything that happened in their house.

[269] She can recall that AJ was crying one day and when they enquired why he is crying, he said that Elna wanted him to lie about his parents.

[270] During cross examination she testified that she had a strong relationship with the Appellants and that she is close to them but does not see them often anymore. She last visited them about two to three weeks prior to their arrest and then they still had electricity. The Appellants never informed her that they had a problem with the electricity.

[271] AJ was moved from her home to her son's home and from there to her niece. At some stage she was asked to take AJ on some weekends as he missed his family.

[272] She testified that it is a lie that the children were chased away. AJ told her that he wanted to go and buy his father a "braaiertjie". She did not question him further as he was already upset.

[273] She knew that the Appellants smoked dagga, but at the stage of their arrest they had stopped using dagga.

[274] She denied that she was trying to paint the Appellants in a good light. She testified that if you do something wrong you have to pay for it.

[275] During questions by the learned Regional Magistrate, she testified that she asked AJ what the lady wanted him to testify, and he responded that the lady said he may not speak, and she still does not know what he was told to say as he refuses to talk.

[276] The defense called Ms. R who testified under oath that she knew the Appellants, who are her friends. She lived with them for about eight months, and she visited them for the last time about a week before their arrest.

[277] She testified that their living circumstances were normal. The children slept on beds that had bedlinen on. The linen was washed weekly. The house was clean and neat. LA had a close relationship with the 2nd Appellant and LA was very attached to the 2nd Appellant. They spent a lot of time together. LA was a good and loving little girl. The 1st Appellant had a normal relationship with AJ, and he often took AJ out to do father-son things. She had a close relationship with the children. The children had very good manners and were very loving. They loved to play computer games or watch DVD's. There was food in the house. She and her girlfriend Bianca would occasionally take the children to the park to play.

[278] She knows the allegations against the Appellants. She has no knowledge of-, and no sexual misconduct happened while they lived there. The children also never complained to her about any such abuse, and they would have informed her if it happened. Should the children have reported the same to her, she would have reported it immediately.

[279] She admitted that she occasionally used drugs (CAT) with the Appellants over weekends, but it never happened in the presence of the children. They would use the drugs in the bedroom of the Appellants.

[280] She denied that the children were neglected. She admitted that there were difficult times since about a month prior to their arrest as the 1st Appellant did not receive his salary and no money came into the household.

[281] She testified that she was not aware that they did not have electricity for about three weeks prior to their arrest. She stated that she did visit them in those three weeks, but they had electricity as they had a prepaid meter.

[282] The police never contacted her about the case.

[283] She denied the version of LA that she had hurt her.

[284] She denied that she went with the 1st Appellant to buy medicine which they put into a thing and injected into LA's arms and legs.

[285] She has no knowledge of a stick being pushed into LA's "piepieplek".

[286] She was confronted with the evidence of Mrs. Smith that LA would have told her that she put her fingers into LA. She denied the statement.

[287] She denied a statement by Mrs. Smith that the person that most probably took the nude photos of the complainant would have been Uncle R. She responded that she was the only R and she is a female.

[288] During cross examination by the prosecutor, she testified that she knew both the Appellants since school. She was in a love relationship with Ms B, and they lived together at the Appellants' home. They moved from the Appellants around February of the year of their arrests. Since the arrests of the Appellants, they had not had contact with the Appellants, until the 2nd Appellant asked her for her number and her email address.

[289] The children were not at home when they used the drugs.

[290] She did not take note whether the Appellants had electricity with their last visit about three weeks prior to the arrest of the Appellants and the possibility exists that there was no electricity at that stage.

[291] She testified that the Appellants did not intend to move, but thereafter stated that she was not aware that they intended to move. She did not notice if there were packed boxes as she was not really inside the house.

[292] She was known as R and addressed as such by LA.

[293] She never took photos while sexual deeds were committed with LA.

[294] Her phone belongs to her employer (Vodacom) and all that she did with her phone was cloned and could be seen by her employer.

[295] She denied that there is truth in what Mrs. Smith testified that LA had told her (that LA had to lick the private parts of the witness).

[296] It was put to her that it is strange that LA would have implicated her in the commission of these crimes if they had a good relationship and if nothing of the

sort happened. She could not explain why LA would have made these false allegations against her. She added that a 5-year-old child can be foretold.

[297] She confirmed the version of both the Appellants about the mode of disciplining that they applied when the children did wrong.

[298] During questions by the learned Regional Magistrate, she testified that she believes that LA was foretold because that was her experience as a child. If she did something wrong, she would be told to tell a certain story.

[299] It is significant to mention, and of grave concern to me that there was such an opposition by the prosecutor to the request of the defense to consult with AJ. He was a complainant on some of the charges, who was not called as a witness for the State. Should the State elect not to call a witness, the witness becomes available for the defense to consult with and possibly be called in the defense case. In this instance, the defense formally informed the prosecution of their intention to consult with AJ on 3 June 2019. On 14 June 2019 the State responded that the defense had to formally apply to the Court to consult with AJ. On 19 June 2019 the defense indicated to the prosecution that they will abandon their request to consult with AJ if the State is willing to have his statement to the police handed in and an admission by the State of the contents thereof. The defense complied with the request of the prosecution and brought a formal request in Court to consult with AJ and if need be, call him as a witness on 12 November 2019³. The State opposed the formal application, and their main argument was that it would not be in the interest of AJ that the defense consults with him, based on section 28 of the Constitution and the Child Justice Act. I find it concerning that the learned Regional Magistrate allowed the State to address the Court in their argument about

³ The full argument by the defense can be found at Pages 585 to Page 596 of Volume 5.

findings that were made by Karam during therapy with AJ. This is nothing less than allowing evidence to be entered in an inadmissible way, to influence the presiding officer. The State informed the trial court of “information” obtained of family violence, photos being taken, violence by the father against the mother, the mother abandoning them and so forth. This is inadmissible hearsay, and I can see no reason other than to influence the presiding officer in his opinion about the Appellants. The learned Regional Magistrate erred in allowing the State to present such “evidence” during the argument. The learned Regional Magistrate ruled on a further date that the defense is permitted to consult with AJ on condition that it takes place in the presence of the prosecutor, or the social worker assigned in the case. To balance the interests of the child, AJ with the interests of the Appellants in presenting their case, the decision by the learned Regional Magistrate that such consultation should take place in the presence of the social worker assigned to AJ cannot be faulted. For the trial court to order in the alternative that such consultation by the defense may only take place in the presence of the prosecutor cannot be agreed with. The State elected not to call AJ, and by then it was clear that the State intended relevant evidence not to be revealed to Court, namely what AJ said to the police in his statements. There could be no valid reason for an order that the prosecutor should be present during a consultation between a defense attorney and an available complainant that was not called by the prosecution. The protection of the interests of the child would have sufficiently been guaranteed by the presence of a social worker during such consultation.

[300] After the consultation with AJ, the defense elected not to call him and closed their case.

Arguments by the litigants

[301] The State argued for a conviction on the remainder of the charges namely counts 1 to 8 and 11.

[302] The defense's main arguments were that LA was not a competent witness and the Court should not attach any weight to her evidence. It was further argued that the State did not adduce any corroboratory evidence and referred to the medical examination by the medical doctor that did not corroborate the version of LA, the reports made to Mrs. Smith was not consistent with the evidence of LA during trial, and no evidence of child pornography was discovered on the hard drives of the computers seized at the residence of the Appellants. It was argued that the evidence of Dr du Toit is inadmissible because Dr du Toit opines on whether sexual crimes were committed against AJ, which is the function of the Court. In respect of the child abuse or child neglect (count 11) the defense argued that the evidence before the Court did not prove child abuse or deliberate neglect as per the definitions for abuse and neglect and parental responsibilities in terms of the Children's Act, 38 of 2005. In respect of the count 11 the defense argued that the Appellants made the necessary admissions that warrants a conviction on count 11.

Judgment by the Court *a quo*

[303] The learned Regional Magistrate considered the totality of the evidence in coming to a judgment without ignoring any part of the evidence.

[304] The learned Regional Magistrate found that the onus rests on the State to prove the guilt of Appellants beyond reasonable doubt and not beyond any doubt.

[305] The learned Regional Magistrate found that the Appellants used drugs during and before the incident.

[306] The learned Regional Magistrate found that the competence of LA to testify was not pertinently disputed and that there were no shortfalls pertaining to the complainant's competence to testify.

[307] The learned Regional Magistrate found that LA was a single witness and that her evidence should be considered with caution.

[308] The learned Regional Magistrate recognized that the evidence of a minor child should be considered with caution.

[309] The learned Regional Magistrate found that he could find no reason for LA to falsely implicate the Appellants and that he found it strange that LA would do so in a so-called happy and loving household.

[310] The learned Regional Magistrate found that LA's evidence about sucking the penis is more than fantasy or being foretold.

[311] The learned Regional Magistrate found that LA's description of the stick that was used to penetrate her anus, can easily fit in with one of the sex toys that were found in the house of the Appellants because LA further described it to Mrs. Smit.

[312] The learned Regional Magistrate found that there was a measure of corroboration for LA's description of the events in the medical evidence.

[313] The learned Regional Magistrate found that considering the youthfulness of LA, her level of development and the lapse of time between the occurrence of the events and her giving evidence in Court is a sure indication that she succeeded to recall specific incidents and was able to differentiate the detail, the places, the incidents, and the circumstances.

[314] The learned Regional Magistrate found that Mrs. Smit had no reason to opine that the complainant seemed neglected.

[315] The learned Regional Magistrate found that the evidence of Mrs. Smith, Warrant Officer van Dyk, Dr Lukhozi, Constable Payne, and Dr du Toit, read with the evidence of the complainant in respect of the numerous charges, unequivocally points to abuse and child neglect and poor care.

[316] The learned Regional Magistrate found that no negative inference will be drawn from the fact that AJ did not testify due to the clearly motivated expert report of Dr du Toit.

[317] The learned Regional Magistrate found that the fact that no child pornography was found on three of the six hard drives did not mean that no other photos were taken.

[318] The learned Regional Magistrate found that no reason exists not to accept the evidence of Dr Lukhozi.

[319] The learned Regional Magistrate found that no reason existed for any of the witness to give false evidence against the Appellants and that the state witnesses

continuously made good impressions on him, and the Court could not find any reason to reject their evidence.

[320] The learned Regional Magistrate found that there were no material contradictions between the evidence of the state witnesses.

[321] The learned Regional Magistrate accepted the totality of the evidence adduced in the State's case.

[322] The learned Regional Magistrate found that there was no basis for the 1st Appellant to make the assumptions that he made in respect of the involvement of Mr. Hans Smit.

[323] The learned Regional Magistrate highlighted the contradictions in the evidence of the 1st Appellant in respect of their lifestyle, whether they were in the process of moving and the contradictory evidence of the 2nd Appellant in respect of the state of the house, when they last used drugs and whether the LA ever ate jelly.

[324] The learned Regional Magistrate found that the evidence of Warrant Officer Boshoff did not really assist the defense, but that his testimony cannot be faulted namely that he took a statement from AJ.

[325] The learned Regional Magistrate found that what AJ had said to Mrs. Stassen is and remains hearsay.

[326] The learned Regional Magistrate found that it was improbable that the children could have slipped out at night without the knowledge of the Appellants if they were so-called happy and well cared for.

[327] The learned Regional Magistrate found that none of the defense witnesses could really contribute to what happened in that house and that the value of the evidence of Ms. R is limited.

[328] The learned Regional Magistrate found that it is improbable that LA fabricated false evidence against the Appellants.

[329] The learned Regional Magistrate referred to and considered what Dr du Toit heard from- or was told by AJ.

[330] The learned Regional Magistrate rejected the evidence of the Appellants as false and not reasonably possibly true in so far as it is in contrast with the evidence of the State.

[331] The learned Regional Magistrate found that the evidence of LA was corroborated by the circumstantial evidence, and the reports made in detail to Mrs. Smith.

[332] The learned Regional Magistrate found that both Appellants were active parties involved in the commission of the crime.

[333] The learned Regional Magistrate convicted the Appellants counts 1, 3 to 6, 8 and 11.

[334] The learned Regional Magistrate acquitted both Appellants on count 2 (the rape of AJ) and count 7 (the production of child pornography).

The applicable law

[335] It is trite law that a Court of appeal may only interfere or tamper with the trial court's judgment in circumstances where the Court finds that the trial court misdirected itself as regards to findings of facts or the law⁴.

[336] It is trite law that the onus rests on the State to prove the guilt of the Appellants beyond reasonable doubt⁵.

[337] The best interests of the child are of paramount importance in every matter concerning the child⁶. The Court is fully aware that the whole legal and judicial process must be child sensitive.

[338] It is trite law that the Court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence with caution, on account of the nature of the offence alone⁷. Evidence of a victim of sexual abuse may not be considered with caution for the mere fact that the witness is a victim of sexual abuse.

⁴ *R v Dlumayo & Another* 1948(2) SA 677 A; *AM & Another v MEC Health, Western Cape* 2021(3) SSA 337 SCA.

⁵ *S v Tanatu* 2005 (2) SACR 318 (E), at paragraph 37, "The State is required, when it tries a person for allegedly committing an offence, to prove the guilt of the beyond a reasonable doubt. This high standard of proof – universally required in civilized systems of criminal justice – is a core component of the fundamental right that every person enjoys under the Constitution, and under the common law prior to 1994, to a fair trial. It is not part of a charter for criminals, and neither is it a mere technicality. When a court finds that the guilt of an accused has not been proved beyond reasonable doubt, that accused is entitled to an acquittal, even if there may be suspicions that he or she was, indeed, the perpetrator of the crime in question. That is an inevitable consequence of living in a society in which the freedom and the dignity of the individual are properly protected and are respected. The inverse – convictions based on suspicion or speculation – is the hallmark of tyrannical systems of law. South Africans have bitter experience of such a system and where it leads to."

⁶Section 28(2) of the Constitution, 1996

⁷ Section 60 of the Sexual Offences and Related Matters Act, Act 32 of 2007.

[339] It is trite law that the evidence of a single child witness must be treated with caution⁸.

[340] No onus rests on the Appellants to prove his or her innocence⁹. To be acquitted, the version of the Appellants need only be reasonably possibly true¹⁰.

[341] The Appellants carries no burden to convince the Court of the truth of their versions¹¹.

In conclusion

In respect of the competence of complainant to testify

⁸ *S v Viveiros* (75/98) [2000] ZASCA 95.

⁹ *S v Mhlongo* 1991 (2) SACR 207 (A), at 210d-f; *R v Hlongwane* 1959 (3) SA 337 (A), at 340H.

¹⁰ *S v Van der Meyden* 1999 (1) SACR 447 (W): “The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, *R v Difford* 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.”

¹¹ *S v V* 2000 (1) SACR 453 (SCA) paragraph 3(i): “It is trite that there is no obligation upon an person, where the State bears the onus, “to convince the court”. If his version is reasonably possibly true, he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the ’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 ’s evidence may be true.”

[342] I thoroughly considered the arguments by the defence. The learned Regional Magistrate found LA to be a competent witness after she was questioned in that respect. It is noted that the learned Regional Magistrate did not grant the defence an opportunity to also question LA on her competence prior to concluding that she is a competent witness and therefor admonishing her to tell the truth. During cross examination of LA, the defence did continue to question the witness about her competence to testify. The defence did not pertinently dispute her competence to testify during the evidence of LA. This aspect was raised for the first time by the defense in argument before judgment.

[343] Thus, the Court finds that the learned Regional Magistrate did not err in finding that the competence of the witness was not pertinently disputed. Thorough consideration was given to the arguments raised by the defence in respect of the competence of the witness.

[344] The test whether a witness is competent to testify is whether the witness can distinguish between truth and falsehood¹².

[345] The Court must distinguish between an incompetent witness (one who does not understand the difference between truth and lies and who does not know the consequences of lying) as opposed to the competent witness who is not trustworthy.

[346] In the decision of *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others*¹³ the Constitutional Court

¹² *Ndaba v S* (AR528/2017) [2018] ZAKZPHC 17 (18 May 2018) and *Matshivha v S* (656/12) 2014 (1) SACR 29 (SCA).

¹³ 2009 (2) SACR 130 (CC) at paragraph 165.

expressed the sentiment that “..the evidence of a child who does not understand what it means to tell the truth is not reliable. It would undermine the accused ’s right to a fair trial were such evidence to be admitted”.

[347] However, a Court may rule a witness to be competent to give evidence, but ultimately find that the evidence of the witness cannot be relied upon.

[348] The provisional finding of competence may be revisited and overruled during the hearing if it becomes apparent that the witness clearly does not have the ability to distinguish between truth and lies.

[349] I have thoroughly considered the evidence of child witness, LA. I am fully aware of the effect that my decision will have on the rights and interests of the child victim. I am fully aware that the whole legal and judicial process must be child sensitive.

[350] However, in the adjudication process, sight should not be lost of the fundamental principle of our law, that in a criminal trial the burden of proof rests on the prosecution to prove the ’s guilt beyond a reasonable doubt. Not one of the principles set out in section 28 of the Constitution, nor the principles set out in section 35(3)(h) of the Constitution can be sacrificed.

[351] The Court must guard against being too readily critical of the child witnesses and, at the same time, avoid too readily excusing material shortcomings in the State’s case¹⁴.

¹⁴ Schwikkard *et al Principles of Evidence* 3 ed (2009) at pages 558-559 discusses the underlying philosophy for the evidentiary rules of law. Section 35(3)(h) of the Constitution pertinently confirms the presumption of innocence in our law.

[352] In considering the evidence of LA, I may not turn a blind eye to the fact that her evidence leaves much doubt in my mind whether at all it can be relied upon and as such whether she is in fact a competent witness who clearly understands the difference between truth and falsehood, more so due to:

- 352.1 the multitude of non-sensible answers that she provided when she was asked very simple questions¹⁵;
- 352.2 the multitude of contradictions between LA's evidence in Court and the reports she made to Mrs. Smith;
- 352.3 the glaring contradiction between the version of LA in respect of the injuries sustained when she was penetrated with a stick in her vagina and the findings of Dr Lukhozi;
- 352.4 LA's very descriptive tale of how R and the 1st Appellant bought medicine which they injected into her arms and legs with an instrument that was a black pipe with two red things that they press and then things come out. It is a non-sensible and clearly fantasized tale.
- 352.5 LA's evidence about the brown stick that the 1st Appellant picked from a tree and pushed into her vagina to the extent that the blood was running down from her private part up to her feet. Given the medical evidence of no internal or external injuries to the vagina, it is clear that LA fabricated and exaggerated the tale;

¹⁵ As highlighted in detail in the arguments by the defence. See pages 634 to 641 of Volume 5.

[353] I have thoroughly considered the evidence of LA and all other witnesses called on behalf of the State, comparing the evidence of LA with the other evidence adduced. I am of the view that it is evident that LA does not know and understand the difference between truth and lies or what it means to tell the truth to give assurance that her evidence can be relied upon.

[354] As a result, the learned Regional Magistrate should have found, after hearing all the evidence presented by the State, that LA was not a competent witness and that her evidence cannot be relied upon, and that the learned Regional Magistrate erred to find that the LA was a competent witness.

[355] In the alternative, even if LA was ultimately correctly found to be a competent witness, she presented the only direct evidence that implicates the Appellants in the commission of the sexual offences.

[356] When adjudicating the evidence of a single witness, the court must apply a cautionary rule and may only find the evidence sufficient to convict, if the evidence of the single witness is clear and satisfactory in every material respect¹⁶.

[357] It is trite that a court will not rely on such evidence where the witness has made a previous inconsistent statement, where the witness has not had a sufficient opportunity for observation and where there are material contradictions in the evidence of the witness¹⁷.

¹⁶ *S v Sauls* 1981 4 All SA 182 (A).

¹⁷ *Y v S* (537/2018) [2020] ZASCA 42.

[358] For the reasons mentioned in paragraph 352 *supra*, I find that the evidence of LA was not clear and satisfactory in every material respect, and that her evidence was not sufficient to ensure a conviction.

Further erroneous findings of the trial Court

[359] The learned Regional Magistrate erred in finding that evidence of LA in respect of the sucking the penis is more than fantasy or being foretold. This could have been the case had the complainant not given other elaborate detailed fantasized tales, for instance the injections in the arms and the legs, the blood running to her feet. The evidence of LA was riddled with very graphic and detailed events that clearly could not be true if compared with the totality of the circumstantial evidence.

[360] The learned Regional Magistrate erred to find that LA's description of the stick that was used to penetrate her anus, can easily fit in with one of the sex toys that were found in the house of the Appellants because LA further described it to Mrs. Smit. There are simply not sufficient grounds to come to such a conclusion. One must bear in mind that LA did not testify in Court that it was a brown item able to be switched on and that it vibrated. It was only Mrs. Smith that said that LA had told her so. LA only stated that it was a stick that the 1st Appellant picked from a tree in their yard.

[361] The learned Regional Magistrate erred in finding that there was a measure of corroboration for LA's description of the events in the medical evidence. The doctor found an old, healed scar on the outside of the anus and could not exclude penetration but could not conclusively find the cause of the injury.

[362] The learned Regional Magistrate erred by accepting the evidence of Mrs. Smith, Warrant Officer Van Dyk, Constable Du Toit, Dr Lukhozi read with the evidence of LA in respect of the numerous charges, unequivocally points to abuse and child neglect and poor care.

[363] The Children's Act, Act 38 of 2005, clearly defines the word abuse as: "abuse, in relation to a child, means any form of harm or ill-treatment deliberately inflicted on a child, and includes-

- (a) assaulting a child or inflicting any other form of deliberate injury to a child;
- (b) sexually abusing a child or allowing a child to be sexually abused;
- (c) bullying by another child;
- (d) a labour practice that exploits a child; or
- (e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally".

[364] The Children's Act further defines child neglect:

"in relation to a child, means a failure in the exercise of parental responsibilities to provide for the child's basic physical, intellectual, emotional or social needs";

[365] Section 18 of the Children's Act further lists the parental responsibilities of parents, as follows:

“18. (2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right-

(a) to care for the child;

(b) to maintain contact with the child;

(c) to act as guardian of the child; and

(d) to contribute to the maintenance of the child.”

[366] Care is defined as:

“in relation to a child, includes, where appropriate-

(a) within available means, providing the child with

(i) a suitable place to live;

(ii) living conditions that are conducive to the child’s health, well-being and development; and

(iii) the necessary financial support;

(b) safeguarding and promoting the well-being of the child;

- (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
- (e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;
- (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
- (g) guiding the behaviour of the child in a humane manner;
- (h) maintaining a sound relationship with the child;
- (i) accommodating any special needs that the child may have; and
- (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child;

[367] The admissible evidence does not prove child abuse.

[368] In the alternative the State had to prove deliberate neglect to secure a conviction in terms of section 305(3)(a) of the Children's Act.

[369] The admissible evidence did not prove deliberate neglect of the children.

[370] The learned Regional Magistrate erred by accepting the evidence of Dr Du Toit about what AJ had told her. Just as the learned Regional Magistrate ruled that Ms Stassen's evidence about what AJ had told her "is and remains hearsay", the same principle should have been applied to the evidence of Dr Du Toit in respect of what AJ had told her.

[371] The learned Regional Magistrate erred by finding that the expert opinion of Dr Du Toit corroborates the evidence of LA. Dr Du Toit cannot replace the function of the Court to decide whether the crimes were committed.

[372] The learned Regional Magistrate made a disturbing remark when he found that the fact that no child pornography was found on three of the six hard drives does not mean that no other photos were taken. Did he insinuate that there was child pornography on the other hard drives that were not examined by the police? The beginning and the end of the facts are that irrespective the evidence of LA that nude photos were taken from her and AJ, and it were transferred onto the computer, CD'S were cut and provided to their friends, such evidence was not corroborated by the evidence after all the hard drives in the home of the Appellants were provided to the State for analyses. It is further disturbing to note that the fact that the State found no child pornography on the hard drives already as early as February 2015, a newspaper article was published in June 2015 claiming that the Appellants produced child pornography, Dr Du Toit used these facts in her examination and the State continued to put charges of producing child pornography against the Appellants in 2016.

[373] The learned Regional Magistrate erred to base the convictions on the fact that he could find no reason existed for any of the witnesses to give false evidence against the Appellants. It can never be sufficient reason or basis to accept the version of the State above the versions of the Appellants¹⁸.

[374] I find it difficult to agree with the observation of the trial court that the state witnesses continuously made good impressions on him and that the Court could not find any reason to reject their evidence. The magnitude of contradictions between the evidence of LA, the first report and the medical doctor are indicative thereof that the state witnesses could not have left good impressions upon the trial court that could have caused the trial court not to find a reason to reject their evidence.

[375] The learned Regional Magistrate erred in finding that there were no material contradictions between the state witnesses.

¹⁸ In *S v BM* 2014 (2) SACR 23 (SCA) the unanimous bench found as follows at paragraph 27:

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

[376] The learned Regional Magistrate erred by finding that there was no basis for the 1st Appellant to make the assumptions that he made in respect of the involvement of Mr. Smit. The Appellants both clearly stated that they do not know the reasons for the false charges but gave any possible reason they could think of for LA to allege what she did allege. It is not for the Appellants to explain or convince the court of the reason for the falsified charges, and should they provide possible reasons for same, it should not be held against them.

[377] The learned Regional Magistrate highlighted the contradictions in the evidence of the 1st Appellant in respect of their lifestyle, whether they were in the process of moving and the contradictory evidence of the 2nd Appellant in respect of the state of the house, when they last used drugs and whether LA ever ate jelly. These were all minor contradictions not relating to the core of the allegations against them. The learned Regional Magistrate erred in overemphasizing these immaterial contradictions in the defense's case.

[378] The learned Regional Magistrate acknowledged and gave weight to information that AJ had given to Dr Du Toit, but in the same breath ruled that information given by AJ to Warrant Officer Boshoff and Mrs. Stassen was hearsay. The correct approach should have been that whatever AJ had told anyone remains hearsay. The learned Regional Magistrate erred to attach weight to what AJ had told Dr Du Toit for her to reach a conclusion.

[379] The learned Regional Magistrate found that it was improbable that the children could have slipped out at night without the knowledge of the Appellants if they were so-called happy and well cared for. I agree with the learned Regional Magistrate. However, I find it just as improbable that if the Appellants chased the

children away, how they would have permitted them to leave with the wallet of the 1st Appellant containing money. How the children exited the yard and why they exited the yard remains an open question. The onus yet again rests on the State and it is not for the Appellants to convince the Court that the children were not chased away.

[380] The learned Regional Magistrate erred in finding that none of the defense witnesses could really contribute to what happened in that house and that the value of the evidence of Ms. R is limited. Ms. R lived in that house and visited the Appellants as recently as three weeks prior to their arrest. Ms. Stassen also frequently visited the Appellants at their home. No reason exists not to believe the defense witnesses that the house was always neat and clean and that they have no knowledge of the gruesome tales of what happened in that house as told by LA. I ask myself the question, if the State believed the version of LA that she was also sexually violated by Ms. R and others, why these culprits were not also charged? It is the undisputed evidence of Ms. R that up until the day that she gave evidence she was not once approached by SAPS either to provide a statement on this case or for any other reason. This is a clear indication that the State themselves were not even convinced of the allegations made by the complainant against anyone else than the Appellants.

[381] The learned Regional Magistrate erred in rejecting the evidence of the Appellants as false and not reasonably possibly true in so far as it is in contrast with the evidence of the State. The learned Regional Magistrate could only have

rejected the evidence of the Appellants if it could find it to be false beyond reasonable doubt¹⁹.

[382] From the record that was provided to us, I could not find any transcript of proceedings where the learned Regional Magistrate gave reasons for his decision to acquit the Appellants on count 2. I raised this with the Appellants' legal representative during the hearing of the appeal and was informed that the learned Regional Magistrate acquitted the Appellants on count 2 because AJ did not testify. If the learned Regional Magistrate was convinced that LA was a credible witness and that her version was accepted, he also should have convicted the Appellants on count 2, because LA also testified in respect of the offences committed against AJ. However, this Court agrees that a conviction on count 2 could also not have been delivered, since the complainant is found to be an incompetent witness, in the alternative an unreliable witness.

[383] The learned Regional Magistrate erred to convict the Appellants on counts 1, 3 to 6 and 8.

In conclusion

[384] I would set aside the convictions in respect of both Appellants on counts 1, 3 to 6 and 8.

[385] I would confirm the conviction and sentence of both Appellants on count 11.

¹⁹ In *S v V* 2000 (1) SACR 453 (SCA) at 455 a-b, para 3, Zulman JA said the following: “*It is trite that there is no obligation upon an person, where the State bears the onus, to convince the court. If his version is reasonably possibly true, he is entitled to his acquittal although his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond reasonable doubt it is false*”.

M GREYVENSTEIN
Acting Judge of the High Court
Gauteng Division, Pretoria

MAJORITY JUDGMENT

DAVIS J (Ledwaba DJP concurring)

[386] I have read the judgment prepared by Greyvenstein AJ and find myself in respectful disagreement therewith. In my view, for the reasons set out hereunder, the appellants' appeals against their convictions and sentences should be refused.

Ad convictions

[387] The starting point is to have regard to the charges in respect of which the appellants had been convicted. As the initial listing of the charges as annexures to the record is incorrect, the sequence of the charges as they were put to the appellants shall be used. The translation is my own.

[388] The appellants were both convicted of the following crimes:

Count 1 – contravention of section 3²⁰ of the Criminal Law Amendment Act²¹ (referred to by Greyvenstein AJ as SORMA) in that the appellants have committed an act of sexual penetration by having inserted a stick into the vagina of the minor child and/or have inserted the penis of the first appellant into her mouth without her consent.

Count 3 – contravention of section 5(1)²² of the Criminal Law Amendment Act in that the appellants have sexually assaulted the minor child by placing the child’s hand on the penis of the first appellant and moving it up and down and/or by placing her hand on the vagina of the second appellant and/or forcing her to lick the vagina of the second appellant.

Count 4 – contravention of section 18(2)(b)²³ of the Criminal Law Amendment Act in that the appellants have committed acts of sexual grooming by performing a sexual act with each other in the presence and in view of the minor child or encouraging or coercing the minor child to

²⁰ “Section 3 Rape – Any person (“A”) who unlawfully and intentionally commits an act of sexual penetration with a complainant (“B”) without the consent of B, is guilty of the offence of rape”. In terms of the definition in section 1 of that Act “sexual penetration” is defined as being inclusive of “any act which causes penetration to any extent whatsoever by – (a) the genital organs of one person into or beyond the genital organs, anus or mouth of another person; (b) any other part of the body of one person or any object ... into or beyond the genital organs or anus of another person ...”.

²¹ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

²² “5 Sexual Assault – (1) A person (“A”) who unlawfully and intentionally sexually violates a complainant (“B”) without the consent of B, is guilty of the offence of sexual assault. In terms of the definition of “sexual violation” contained in section 1 of the Act, it includes “... any act which causes (a) direct or indirect contact between (i) the genital organs or anus of one person ... including any object resembling or representing the genital organs; (ii) the mouth of one person and (aa) the genital organs or anus of another person; (bb) the mouth of another person; (cc) any other part of the body of another person ... which could ... (bbb) cause sexual arousal or stimulation or (ccc) be sexually aroused or stimulated thereby ... or (b) the masturbating of one person by another person ...”

²³ 18(2)(b) A person (“A”) who commits any act with or in the presence of B or who prescribes the commission of any act to or in the presence of B with the intention to encourage or persuade B or to diminish or reduce any resistance on the part of B to (i) perform a sexual act with A or a third person (“C”); ... (iii) be in the presence of or watch A or C while A or C performs a sexual act; or ... (iv) expose his or her body or parts of his or her body to A or C in a manner and circumstances which violate or offend the sexual integrity or dignity of B (where in term of section 18(1)(b) B is a child) is guilty of the offence of sexual grooming of a child”.

witness a sexual act or masturbation being performed by the appellants in order to reduce her resistance to sexual acts.

Count 5 – contravention of section 4²⁴ of the Criminal Law Amendment Act in that the appellants forced their minor son to insert his penis and/or fingers into the minor child’s vagina.

Count 6 – contravention of section 21(1)²⁵ of the Criminal Law Amendment Act in that the appellants have unlawfully and intentionally displayed their genitals to the minor child or caused her to be exposed to views of their genitals for purposes of sexual gratification of the appellants and/or caused the minor child to be a witness to a sexual offence in that the second appellant had demonstrated to the minor child how she should perform fellatio on the first appellant.

Count 8 – contravention of section 305(3)(a) or 305(4) of the Children’s Act²⁶ in that the appellants have abused or neglected the minor child by sexually abusing the child or to allow the child to be sexually abused and/or by knowingly failing to provide proper care for the child.

Count 11 – possession of an undesirable dependence producing substance in contravention of section 4(a) or 4 (b) of the Drugs and Drug Trafficking Act.²⁷

²⁴ “4 Compelled Rape – Any person (“A”) who unlawfully and intentionally compels a third person (“C”) without the consent of C to commit and act of sexual penetration with a complainant (“B”) without the consent of B is guilty of the offence of compelled rape”.

²⁵ “21(1) A person (“A”) who unlawfully and intentionally, whether for the sexual gratification of A or of a third person (“C”) or not, compels or causes a child complainant (“B”), without the consent of B to be in the presence of or watch A or C while he, she or they commit a sexual offence, is guilty of the offence of compelling or causing a child to witness a sexual offence”.

²⁶ “305(3) A parent ... is guilty of an offence if that parent (a) abuses or deliberately neglect the child ... or (4) ... fails to provide the child with adequate food, clothing, lodging or medical assistance”.

²⁷ 140 of 1992.

[389] Nothing need be said about the convictions on Count 11 as I agree with the analysis and reasoning of Greyvenstein AJ and her view that the appeals against convictions and sentences in respect of this count should be refused.

[390] All the offences were alleged to have taken place during 2014 in Sinoville, being in the area of jurisdiction of the court a quo and the offences were alleged to have been committed intentionally and unlawfully and without the consent of the minor child.

[391] As indicated, the minor child referred to in the charges of which the appellants have been convicted, is their minor daughter. She was 5 years old at the time of the alleged offences. In paragraph 337 of her judgment, Greyvenstein AJ mentions that “the whole legal and judicial process must be child sensitive”. For this reason, despite the fact that the formulation of the offences in the Criminal Law Amendment Act refers to a “complainant” (being “B” in the sections referenced in the respective charge sheets), I shall refer to the child as “the minor child” or “the victim”, as the case may be. This will not only be “child sensitive” but in accordance with the definition in the Criminal Law Amendment Act itself where “complainant” is defined as “the alleged victim of a sexual offence”. It hardly seems appropriate to refer to a minor who was an alleged victim of crimes of a heinous nature as a “complainant”, i.e. one who complains.

[392] The evidence led by the prosecution commenced with that of the minor child and thereafter the evidence of the foster mother in whose care the child had been placed was put before the court. The prosecution case further included the evidence of the members of the police who have initially investigated the scene, being the home of the child and her brother after they had ran away from home,

concluding with the evidence of a psychologist, explaining why the evidence of the minor child's brother (8 years old) would not be led due to him being so traumatized by events. That is also why count 2 was not proceeded with, being an allegation that the brother had also been raped.

Competence to testify

[393] Greyvenstein AJ had concluded that the minor child was not competent to testify before she proceeded in the alternative to reject the minor child's evidence. It is therefore opposite to deal with the aspect of competency first before proceeding with an analysis of the evidence and consideration of the issues relating to credibility and weight of the evidence.

[394] Greyvenstein AJ had correctly referred to the relevant test for competency as being whether the witness can understand the difference between truth and lies and knows the consequences of lying.²⁸

[395] Greyvenstein AJ also referred to an extract from *Director of Public Prosecutions*²⁹ wherein reference had been made to the reliability of evidence given by a child, but the very next paragraph to the one quoted from by Greyvenstein AJ is, to my mind, directly applicable to this case. At par [167] the Constitutional Court stated the following: "*When a child, in the court's words, cannot convey the abstract concepts of truth and falsehood to the court, the solution does not lie in allowing every child to testify in court. The solution lies in the proper questioning of children, in particular, younger children. The purpose of questioning a child is not to get the child to demonstrate knowledge of the abstract concepts of truth and falsehood. The purpose is to determine whether the child*

²⁸ Par [344] above and *Matshiva v S* (at footnote 12 above) and *S v V* 1998 (2) SACR 651 (C)

²⁹ At par [346] above with reference to par 166 of that judgment

understands what it means to speak the truth. Here the manner in which the child is questioned is crucial to the enquiry. It is here where the role of the intermediary becomes vital. The intermediary will ensure that questions by the court to the child are conveyed in a manner that the child can comprehend and that the answers given by the child are conveyed in a manner that the court will understand”.

[396] In my view, this is exactly what had happened in this case. The minor child was properly questioned and gave answers in such a manner that it had correctly been concluded that the minor child was a competent witness. In order to illustrate this and to demonstrate why I differ from Greyvenstein AJ, I quote from the inception of the questioning of the minor child by the court, utilizing the words used by the intermediary and my own translation, when the customary elements of an oath or affirmation was canvassed:

“Could you tell us your name and surname? – The minor child gave her name correctly but gave the surname of the foster care mother.

How old are you? – Seven

So you had your birthday a couple of days ago? Uhm

*You had your birthday a couple of nights ago? We only want to know?
– Yes.*

The eighth, is that correct? – No

Are you going to big school yet? – Yes

Tell us, in which school are you? – Grade one.

Which school? – The minor child gave the correct name of the school.

Is it nice at that school? – Yes.

Have you started running, sport and athletics? – No

Do you have a brother? – Yes

Do you have a sister? Two

With whom did you come here today? – Mommy

What is her name? – The minor child gives the name of the foster care mother.

Do you know about colours? – Yes

*Here in this room where we are sitting, what colour are the walls?
– Green*

Do you know about animals? – Yes.

Do you see the animals behind you (painted on the wall)? – Yes.

This green, let's call min a guy a guy, what animal is it? – A frog.

And this one sitting on a twig? A bird.

Do you know what it is if someone tells a lie? – Yes.

Tell us what it means if someone tells a lie? – Then they go to the devil if they lie.

And if someone tells the truth, do you know what that is? -Then they don't go to the devil, then it is the truth.

It is the right thing to tell the truth? – Yes.

We are now going to ask you a couple of questions, then you must tell us whether it is the truth or a lie. If we tell you that you are seven years old, is that the truth or a lie? – It is correct.

And if we tell you that you have no brothers or sisters? – You are lying.

And if, look quickly, if we tell you that green thing sitting there is a giraffe? – You are lying.

And if I tell you this one on the twig is a parrot? - You are lying.

I might be wrong about that. So if you come and tell us your story about why you are here today, you must only tell the truth, you must not lie once, you must not lie about anything, is that ok? – Yes.

(Then the minor child takes a sip of cooldrink)

*Prosecutor: Can you tell us, why are we all here at court?-
Because we have to tell the truth about what had*

happened with me and I don't want to go and live at the house I had lived in before, because they had also hurt me".

[397] On the following question about where the minor child had lived before, she referred to her parents as “uncle” and “aunt” (oom en tannie), rather than “dad” and “mom”. Mr Moldenhawer who appeared on behalf of the appellants before us feebly argued that this may have been because the minor child had been in foster care for almost eighteen months prior to the trial, as if a child would have forgotten who her parents were in that time. This is not a sustainable argument. The minor child later in her evidence acknowledged that the appellants were indeed her parents, but clearly sought to distance herself from them.

[398] In my view the learned magistrate had correctly concluded that the minor child could distinguish between a truth and a lie and had correctly understood the obligation, not only in general, but also on her, to tell the truth in court.

[399] In my view therefore, Greyvenstein AJ, despite clearly being aware of the distinction between competence of a witness and the reliability of her evidence, have conflated the two and, due to what she had viewed to be material discrepancies, incorrectly concluded that the minor child was not a competent witness.

[400] I shall now turn to the evidence itself and the issues of discrepancies and credibility.

The evidence

[401] Greyvenstein AJ has in her judgment provided extensive references to the evidence. Before dealing with the issues of credibility and the acceptance or rejection of the minor child's evidence, it is apposition to highlight what the minor child has actually said in relation to facts which could constitute those offences of which the appellants had been found guilty. I shall do so with reference to the specific paragraphs in the judgment of Greyvenstein AJ.

[402] In respect of Count 1, that is statutory rape, the minor child has said that the appellants had instructed her to fellate the first appellant. The facts relating to penetration in her mouth by the first appellant's penis for his sexual gratification was described by the minor child that she had to swallow what he had ejaculated and that it was a bad-tasting jelly-like substance (par 34 of the judgment of Greyvenstein AJ read with par 61 thereof). This evidence satisfies the elements of the offence to which this count relates as well as the alternate description in the charge sheet.

[403] Count 1 also contained, as an alternate, a second incident of rape, namely penetration of the minor child's vagina with an object, in this case a stick. Particulars thereof can be found in paragraph 35 of the judgment of Greyvenstein AJ. I shall deal with the criticism of this evidence, particularly to the source and description of the stick as well as the extent of penetration and injuries later.

[404] In respect of Count 3, that is placing the minor's hand on the penis of the first appellant and by moving or rubbing it up and down (or from side to side), the evidence of the minor child describing this incident accords with the description of the offence contained in the charge sheet and has been referenced by Greyvenstein AJ in the first part of par 34 of her judgment.

[405] In respect of the sexual grooming forming the subject matter of Count 4, the demonstration of fellatio performed by the second appellant on the first appellant as a demonstration to the minor child of how to perform that act, clearly satisfies the elements of the offence in question.

[406] Similarly, the elements of forced rape forming the subject matter of Count 5 and the description thereof, namely that the minor child's brother had to lie on top of her on the instructions of the appellants and while the first appellant held her down by her shoulders, have been satisfied. Detail of penetration had also been reported to the foster mother. The only difference between the description of the minor child and the particulars of the charge sheet, is that she additionally testified that her brother had also been forced to put his "tollie" into her mouth and her anus as well. Greyvenstein AJ referenced this, having translated (correctly) that the minor child had referred to these acts as "nasty things".

[407] In respect of Count 6, it is clear that there had been a gratuitous display of the appellants' genitals to the minor children, clearly for purposes of sexual gratification. I do not consider this a duplication of charges as it is clear that this had happened on multiple occasions, apart from the specific instances referred to in the other charges. As a separate incident, the minor child also testified that she had to perform cunnilingus on the second appellant's vagina while the first appellant watched. This clearly also satisfies the wide nature of the particular section of the Criminal Law Amendment Act.

[408] Once the elements of sexual abuse have been established, the contravention of Count 8 has also been established as that is not how parents should care for minor children. In addition, despite the appellants' best exculpatory explanations

of the children merely having gone to play in a nearby park or having gone to purchase a small “braaiertjie”, the indisputable evidence of those who found the children wandering on the street, including the evidence of the police, is that they had been dirty, disheveled, hungry and were running away from a situation they found intolerable. After they were taken in the care of the police and members of the Community Policing Forum, they were even given food donated by community members. I am of the view that both the elements of abuse and neglect had been established.

[409] I am further of the view that the versions of the minor child in respect of the facts relating to the charges were corroborated by the evidence of the foster parent. She was the first person in whose care the minor children felt safe. That much is evident from the fact that the minor child called her “mommy”. Of course the foster parent was not present during the actual incidents and could not give direct evidence which would have corroborated the minor child’s version, but the corroboration is to be found in the contents of the reports, indicating that the evidence was not a recent set of fabrications or a set of instructions given to the child, but a persistent repetition of her recollection of the events. These were referred in paragraphs 60 to 65 of the judgment of Greyvenstein AJ.

[410] There is nothing in the evidence of the Community Policing member, Mrs Van Schalkwyk, nor in the evidence of the two police officers, Warrant Officer Van Dyk or Constable Payne which contradicts the evidence of the minor child of how she and her brother had been found, in any material way. The elements of neglect relating to the wandering children were furthermore confirmed by the photographer Mr Von Benecke. The evidence of the CEO of the Sinoville Crisis

Centre confirmed that by and large confirmed the circumstances in which the children had been found, despite some of her evidence being hearsay.

[411] The only other state witness of relevance to the alleged crimes was Dr Lukhozi. His evidence had been dealt with by Greyvenstein AJ from par 112 of her judgment. There are two aspects of his evidence regarding his examination of the minor child which are of particular relevance. The first is that upon a vaginal examination, he found everything to be normal, with no signs of injury. In particular he found the hymen and the hymenal opening to be intact.

[412] The second aspect of Dr Lukhozi's examination findings which is relevant, relates to the minor child's anus. There the learned doctor had found a "fissure or crack". The injury was not fresh. Although the doctor concluded that the fissure was not conclusive proof of penetration, he classified it as "suspicious of penetration". Although the doctor could not find any signs of dilation of the anus, how he could determine that there were no signs of "fondling or cupping", is beyond me and was neither explored nor explained.

[413] As already pointed out, despite the evidence of the minor child of having been a witness to the incidents to which her brother had been subjected to, the State did not proceed with Count 2, that is rape of the brother by the appellants and in respect of which he, in terms of the Criminal Law Amendment Act, would have been the "complainant".

[414] The apparent reason for this can be found in the fact that the State was unable to lead the evidence of the brother. The reason for this inability was explained by Dr Du Toit, whose evidence was dealt with the Greyvenstein AJ from par 124 of her judgment. I agree with the summary of Dr Du Toit's evidence and

conclusion formulated as follows by Greyvenstein AJ at paras 128 to 132 “*She recommended that [the brother] should not testify at the trial as he suffers from complex trauma and had a dissociative reaction as a result thereof. During her assessment [the brother] simply refused to answer certain questions ... she gave an opinion that [the brother] did not give any information of any wrongdoings due to the trauma that he had experienced which caused him to block the experiences from brain ... the witness admitted that [the brother] denied that any sexual offences were committed against him but testified that... his body language and emotions proved to the contrary*”. Excluding the “collateral information” which Dr Du Toit may have had regard to, she testified that there was, in the words of Greyvenstein AJ’s paraphrasing of the evidence, “... *much evidence during the assessment to show that [the brother] was physically and sexually abused*”.

Evaluation

[415] There are three primary aspects in relation to which the evidence of the minor child may be criticised. The first is her evidence regarding the stick with which she had anally been probed, the second is the evidence that the stick had also been used to penetrate her vaginally and to the extent that blood ran down her legs and the third was a whole description of having been injected in a very traumatic fashion by the adults. A last, but secondary aspect related to the minor child’s version that photographs had been taken of her and her brother in a naked state and while dancing on the instructions of the appellants and which photographs had been uploaded onto a computer, transferred to compact discs and distributed to the appellants’ friends. The only basis upon which this latter evidence was doubted, was because no trace of such photographs could be found, which led to a finding of not guilty on count 7, relating to the manufacture of child pornography.

[416] I am of the view that the criticism of the minor child's evidence regarding the description and origin of the stick used by the appellants is unjustified. When an elongated object is forced into a minor child of five years old from behind, one would not expect a perfect description of the object under those traumatic circumstances. Whether it was indeed a stick or one of the sex toys which Warrant Officer Van Dyk had found, not on a top shelf as suggested by the appellants, but between shoes, an empty bag and a plate with a straw on the second shelf from the bottom in their room, matters little – it remained a long object which a minor child is expected to describe. When, through the questions, the object was termed a stick and if indeed it had been one, the minor could hardly have been expected to know from whence it had been sourced by the adults. When pushed for an answer, her response that it came from a tree outside the house must be seen in the context of her having to speculate. In the end, it matters not, as the act of penile penetration into the minor child's mouth, being the alternate act contained in Count 1, had sufficiently been established to secure a conviction thereof. Any doubt regarding the evidence about the "stick" therefore becomes immaterial.

[417] The only relevance of the stick further is that the minor child had stated that she had also been vaginally probed with the stick and to the extent that blood ran down her legs. The allegation of penetration which would have caused injury was refuted by Dr Lukhozi and this evidence has rightly been criticized by Greyvenstein AJ and should be rejected, even if one may speculate about the source of the evidence, i.e. the exaggeration by the minor as a result of the traumatic events or whether she may have felt warm urine running down her legs which she may have translated to blood or not, again matters not as the offences had already been established by the other evidence.

[418] In similar fashion, one would not know the source of the minor child's whole description of having been injected with substances or not. The fact that such a description did not form the subject matter of a separate or additional charge, results therein that, even if it is completely ignored or rejected, the remaining findings remain unaffected, the only remaining relevance would be in respect of the issue of credibility or reliability of the remaining evidence.

[419] For many years the evidence of a child witness, particularly as a single witness was treated with caution. The learned Regional Magistrate also referred to this aspect. Our courts have, however, since *Woji*³⁰ moved away from the strict application of what was then known as a "double" cautionary rule to a "more enlightened approach".³¹

[420] This approach has been analysed with reference to *Haupt*³² and *S v Jackson*³³ and found to be as follows: "... *the proper approach was not to insist on the application of the cautionary rule as though it was a matter of rote, but to consider each case on its own merits. Although the evidence in a particular case might call for a cautionary approach, this was not a general rule. The court stressed that it could not be said that the evidence of children, in sexual and other cases, where they were the sole witnesses, obliged the court to apply the cautionary rule before a conviction can take place*".³⁴

³⁰ *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (AD) at 1028B - D

³¹ See: *Bekink*, 'S v Haupt 2018 (1) SACR 12 (GP)' (*Haupt*); 2018 De Jure 318 – 328 "Defeating the anomaly of the cautionary rule and children's testimony".

³² 2000 (2) SA 711 (T).

³³ 1998 (1) SACR 470 (A).

³⁴ *Bekink* above at 323.

[421] In *S v M*³⁵ it was held that the correct approach was not to apply a general cautionary rule, but to look at the evidence as a whole and the reliability of what had been placed before the court.

[422] In *Chabalala*³⁶ the court stressed that the correct approach to a criminal trial, in evaluating the evidence is to “... *weight up all the elements which point to the guilt of the accused against 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*”.

[423] It is trite that the fact that a witness may be disbelieved about a portion of his or her evidence, does not have the result that all of the evidence is to be believed or rejected.³⁷ If one were to then disregard the evidence of vaginal penetration and the version of having been injected with something (which was not ever the subject matter of a charge), the remainder of evidence display events which the minor child has actually experienced. The version of how she had to perform fellatio on the first appellant until he ejaculated, having regard to her description of the appearance and taste of semen, is not something which would or could have existed in her imaginary world or could have been prompted to her as suggested by the appellants (and who would have done that, on the evidence of the case?) but could only have been a “lived experience”.³⁸ The same applies to much of the rest of her evidence referred to earlier in respect of each particular charge.

³⁵ 1999 (2) SACR 548 (A) at 501.

³⁶ *S v Chabalala* 2003 (1) SACR 134 (SCA) at 139i – 140a

³⁷ Zeffert et al, *Essential Evidence*, 2nd Ed, Chapter 4

³⁸ In *Woji*, at 1028D – E with reference to *Wigmore*, Evidence Vol II par 506 the court quoted the following: “*the nature of the evidence given by the child may be of a simple kind and may relate to a subject-matter clearly within the understanding of the child and interest and the circumstances may be such as practically to exclude the risks arising from suggestibility*”.

[424] A court of appeal must also have due regard to the impressions formed by the court *a quo* of the witnesses as they had testified. In this regard, the magistrate formed a distinct impression of the appellants as having not appeared to be credible witnesses. In my view, from a reading of the record, this cannot be faulted. One need only start with the appellants' version as to why the children would ostensibly have gone to buy a "braaiertjie" when they ran away to recognize it as a discreditable attempt at avoiding the true facts. What child would pack a bag with clothing to do shopping? If one adds this to the above evaluation, then the acceptance of the evidence of the minor child and the rejection of the evidence of the appellants appear to be entirely correct and justified.

[425] Even when applying caution to the evaluation of the evidence of the minor child, one has to consider her evidence as a whole and step back a pace lest one may fail to see the wood for the trees.³⁹ In having done so, I find her evidence of the actual crimes of which the appellants have at the end of the trial been convicted, as acceptable and I have no reasonable doubt that those offences of which the appellants have been accused, have been perpetrated by them on the minor child. In addition I find that they are, as per their own admissions, guilty of the offences mentioned in Count 11. I also find no misdirections in respect of the sentences imposed.

[426] Accordingly, I would refuse the appellants' appeals against their convictions and sentences.

³⁹ *S v Hadebe* 1998 (1) SA SACR 422 (SCA) at 426F – H.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

I agree and it is so ordered.

A P LEDWABA
Deputy Judge President of the
High Court Gauteng Division,
Pretoria

Date of Hearing: 12 March 2024

Date of Judgment: April 2024

APPEARANCES

For the Appellants: Mr H W Moldenhauer

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For the Respondent: Adv S Scheepers

Attorneys for the Respondent: Director of Public Prosecution, Pretoria