IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)

NOT REPORTABLE

Case no: 63/2021

In the matter between

The State

and

Ayanda Ndlovu **Accused**

JUDGMENT

GOVINDJEE, J

[1] The accused pleaded not guilty to a charge of rape. The state alleged that he unlawfully and intentionally committed acts of sexual penetration with the complainant, P… M…, an eight-year-old child, by having sexual intercourse with her against her will between March and May 2020.

The state's case

[2] Dr Gcolotela, a registered medical practitioner with experience in child sexual assault cases, testified that she had examined the complainant on 8 July 2020 and completed the J88 form. She had been unable to obtain any relevant medical history from the complainant, who had been crying during her consultation. That part of the medico-legal examination report had been obtained from the child's mother. The examination revealed a red / inflamed urethral orifice, brown discharge on the labia minora and red / inflamed vestibule. The hymen configuration was described as 'annular / disrupted' and the margin or edge of the hymen was 'irregular'. The doctor's conclusion was that, based on the nature of the annular / disrupted irregular hymen, the hymen had been perforated and that the examination was cumulatively suggestive of sexual assault.

[3] The examination had revealed older injuries, which had occurred more than 72-hours previously. Tears, lacerations, bleeding and other signs of fresh injuries were absent. Dr Gcolotela explained the closeness of the hymen to the vaginal orifice, and that her examination revealed injuries likely to have been caused by a blunt object that had penetrated the hymen.

[4] Under cross-examination, Dr Gcolotela explained that anti-biotic treatment for a batch of sexually transmitted diseases would have been administered automatically, with a swab of the brown discharge taken to a laboratory for other (non-sexually related) tests to be run. Those tests were not comprehensive due to financial constraints and were a safeguard in case the child did not respond to the treatment administered automatically. The results of these limited tests could not eliminate a disease occasioned by sexual transmission. She testified that she had never come across a patient with an irregular hymen in the absence of an allegation of sexual abuse. The likely cause was blunt force, although the possibility of an irregular hymen being self-inflicted or caused by a disease could not be excluded. There was also no visible cleft. The inflammation could have been caused by the discharge or by the after-effects of mechanical blunt force. Not all women experienced a discharge after sexual intercourse and a person would want to scratch an area where a discharge was causing discomfort.

[5] The doctor explained that hymens were not uniform and not all injuries to this part of the body would include clefts. It was highly unlikely that the injuries to the hymen had been self-inflicted by scratching and she had never encountered a hymen that had been perforated by a finger. The hymen was extremely close to the vaginal orifice and the perforated hymen was indicative of penetration with a blunt object. In her opinion, the medical examination had revealed signs of sexual penetration and it was likely that the discharge had followed sexual intercourse.

[6] The complainant, a 10-year-old female, testified with the aid of an intermediary and via a closed-circuit television system, after being admonished to tell the truth. The court was satisfied that she understood what it means to tell the truth and appreciated the moral implications of telling a lie. She was competent to provide testimony, as confirmed by a psychological assessment report performed by a social worker and accepted by the defence. The submitted report did indicate that the child did not seem to understand the concept of time and date, but that she functioned within her range of cognitive development and could recall audio and visual memories and past events.

[7] The complainant testified that she had stayed in Nompumelelo during 2020, together with the accused, two younger siblings and her mother. During the onset of Covid-19, her mother had been at work and she, her younger siblings and the accused were at home. Her older sister, L… had been staying at ‘Sis Lihle’s’ home.

[8] One day, the accused had told the other children to play outside. He instructed the complainant to undress and climb on top of the bed, which she did. He did the same and then climbed on top of her, proceeding to insert his penis into her vagina. She had cried and was told to keep quiet. When she did so, the accused informed her that he would hit her if she told anybody what had occurred. She had not told anybody out of fear.

[9] This had happened three times. On the second occasion, the complainant had been washing the dishes when the accused instructed her to undress and climb on top of the bed. After he had inserted his penis into her vagina, she had dressed and

gone outside. She had been afraid and was scared that she would be hit and had not told anybody what had happened.

[10] On the third occasion, the other children had gone to the crèche and she had remained at home with the accused as schools had not yet reopened. The same events unfolded. The accused had given her R1 or R2 after the three incidents, but she could not indicate when this had all occurred. Nobody else had done something like this to her. She had eventually told her mother what had happened, and her mother had cried. The family had eventually moved to Mdantsane and nothing had happened to her there.

[11] Under cross-examination, the complainant testified that her mother's uncle, B…, had resided with the family in Nompumelelo when schools had closed during Covid-19 and had been employed at some point in time. M… was the accused's unemployed sister. She had also stayed at their home but at some point had moved to her own place. L…, her older sister, had stayed with another sister of the accused.

[12] The complainant denied that L… had stayed at their house during lockdown, sleeping with M…, or that she had returned when school had closed. She recalled her sister being there before the onset of Covid-19 and then leaving. The accused was lying in saying that he had only been at home from 12 April 2020, and not from the beginning of the lockdown. She had not complained to her mother of any pains while being washed and had not told her about the incidents even when they were alone together. She would visit her aunt, Y…, and had also not told her what had occurred out of fear. Even though the accused was not present on those occasions, her concern was that he would hit her. She had also not told her older sister L…, even thought they had a good relationship, because her sister was often away from home.

[13] The accused had been selling cigarettes with the complainant's uncle Lu… during the lockdown, but was lying about selling beers. No people would enter their home, but the accused would occasionally be inside the house. When she had told her mother about her experience, her mother could not stop crying. She had not managed to tell her that this had happened three times, because her mother was

crying so much. Her mother may have forgotten to mention that she had told her that the accused had given her money. The complainant understood that this was to maintain her silence.

[14] Ms N… M…, the mother of the complainant, testified that she had five children. The accused had fathered some of the children and they had been in a relationship for seven years. That relationship had ended when she had discovered his sexual conduct towards the complainant.

[15] The lockdown had impacted upon the family. The accused was unemployed from 29 March 2020 but she had remained employed. Her oldest child L… generally lived at school but had been sent home during the lockdown, typically residing with Lihle because their home was not big enough for everyone. L… had, however, stayed at their home for a week during the lockdown period, but the witness could not remember when exactly this had occurred. She had subsequently returned to Lihle's home. M…, a cousin of the accused, had stayed with them for a short period of time while she was unemployed. Her uncle J…M… (aka B…) had stayed with them for two weeks while unemployed.

[16] The witness had noticed a change in the complainant's behaviour once they moved to Mdantsane at the end of May 2020. She had become 'jumpy' and afraid. On 7 July 2020, the witness specifically asked the complainant if there was any male person touching her, also on her private parts. The complainant had initially remained quiet. She could not look her mother in the eye, but then told her that it was the accused who had done this. The witness was shocked and had cried so much that she had not asked her child too many questions about what had happened. She was told that the accused would take the complainant to the bedroom on occasion, and that he would tell her to undress, remove her panty and climb on top of her. The child would be told not to cry.

[17] The witness testified that the complainant had been crying while telling her what had occurred, including that the accused had inserted his penis into the child's vagina. The witness had ascertained that her child had become naughty, and had also been found to be assaulting other children. She was unable to ask her child how

many times this had occurred and felt saddened as a parent. The child had told her that she had not disclosed what had happened because the accused had threatened to hit her. The witness had proceeded to lay a charge at the Mdantsane Police Station on 7 July 2020 and taken the child to the hospital the following day. The accused had been arrested on 11 July 2010.

[18] The witness confirmed under cross-examination that she had only noticed the abnormal behaviour while at Mdantsane. The child did not seem to want to play with the accused. She would also not wish to leave her grandmother's care when the accused approached. Both the complainant and her older sister were unhappy that the accused would be accompanying them to Mdantsane. By that time, the witness had decided to live her life without the accused. They were no longer on good terms and she was not being treated properly. The main reason for this was that she had discovered the name of a neighbourhood female on his WhatsApp list.

[19] She would bath the complainant on some occasions before going to work but had not noticed anything. On some days she would leave the children and go to work without bathing them. She was not the only person to bath the children. The complainant had never complained of any pains. The reason that she asked the complainant whether she had been improperly treated or touched on her body or private parts was because the child had shown signs of changed behaviour towards the accused. She denied having suggested to the child that she had been raped.

[20] The witness confirmed that they had been other adults at her home during the lockdown period. Her brother, Lu…, stayed close by and would visit for meals. As to the movements of her oldest child, she said the following in response to questions from defence counsel:

'My instructions are that in January schools opened and closed in March due to Covid-19?

Yes

L… came from school and stayed at your home?

I'm not certain about that…I do not have a clear recollection.

You can't dispute that?

Yes.'

The court later asked an open question seeking to clarify this portion of the testimony. The witness stated clearly that her oldest child had come from Lihle's home and had stayed with the family for a week, at a time when M… was also present. She later confirmed that this child had come from her maternal aunt's (Y…) home at the time they were to move to Mdantsane. L… would also visit Y…, who lived in the same street, during the day.

[21] The mother confirmed during cross-examination that she had been mistaken as to the accused's last working day, which she conceded could have been 12 April 2020. She denied having informed him that her reason for leaving him behind when the family moved to Mdantsane was due to the children's unhappiness with him. She had told him that this was due to the breakdown in their relations and denied that she had orchestrated the rape allegation to terminate their relationship.

The defence

[22] The accused denied committing an act of rape. He had worked for a construction company until 12 April 2020, spending the weekdays away and returning late on a Saturday. Asked about his work in construction, he testified that he would wake up on a Monday morning and would assist N… M… to bath the children, including the complainant, before taking them to crèche. B… had been left with the children while he was working at the start of the lockdown period.

[23] The accused had remained at home with B…, the complainant, her older sister and his two younger children once his work had stopped. N… M… was working. L… had returned from boarding school around 20 March 2020, due to Covid-19, and they had all stayed in the house together. She had remained until the family had moved to Mdantsane. During the day he would stand outside with B… illegally selling tobacco and beer to people from the community and surrounding areas, while keeping an eye out for the police.

[24] He was on good terms with the children and only heard about their departure to Mdantsane when N… M… told him on the morning of the move. She told him that the reason for this was that the children did not like him and that this was due to a

clash over cellular telephone usage between L… and the two youngest children. He had pleaded to accompany N… M… to Mdantsane and she had eventually agreed. Nothing untoward had occurred while they were at Mdantsane. The accused had returned to work on 6 June 2020, coming home only on weekends.

[25] The complainant was lying in alleging multiple instances of rape, and in respect of all the associated details she had provided. He would have been killed by the community had he done anything of the sort, since his one-room shack, which was only 4 metres by 3 metres, was a metre away from the road. He had a good relationship with N… M…'s siblings, Lu… and Y…. Lu… would visit for meals twice per day, once in the morning and then later in the day.

[26] According to the accused, L… and the complainant would sleep on a ¾ bed in the shack, and he, N… M… and the other children would sleep on a couch. B… would sleep on the other side of a fridge, and a curtain would be raised for privacy. B had lived with the family for approximately 3 ½ months. The complainant's father had arrived during May, and spent some time alone with the complainant. The accused indicated that the child could have told her father about the rape, had this really occurred. His family member, M… had stayed with their family during April, sleeping with L…, before N… M… had chased her away based on an issue related to scarcity of household food.

[27] During cross-examination, the accused accepted that L… typically stayed at his sister's home when she returned from school. There was an agreement between N… M… and his sister to this effect, based on the lack of space in their own home. It was more convenient for L… to live with his sister, who stayed in a Reconstruction and Development Programme (RDP) home. His sister had a good relationship with L… and would assist with accommodation if requested to do so. Yet he disputed that L… had stayed with his sister for most of the March – May 2020 lockdown period. The reason for this was N… M…'s concern that other people battling poverty should not be burdened in this way. According to the accused, N… M…'s brother would occasionally come to the house for food before she left for work at 06h45.

[28] The accused testified that he had begged to accompany the family to Mdantsane, as it would have been difficult for him to make ends meet without N… M…'s income. She had wanted to terminate their relationship because the children no longer loved him, and because of the discovery of the number of a lady from the community on his phone. He had not noticed anything amiss with the complainant, despite knowing her well, and recalled her assisting to carry his backpack just prior to his arrest. He did not bath the complainant and could not testify about the condition of her private parts. The doctor had examined the complainant and it was difficult for him to accept the doctor's testimony about what had happened to her. He believed that N… M… had orchestrated her child's allegations of rape as a ploy to terminate his relationship with N… M….

[29] When counsel for the state put it to the accused that there must have been times during which he was alone with the children at home, he retorted that L… had slept the entire day until after 16h00, and that he and the other children had given her time to study by sitting outside. When L… visited her maternal aunt, he would go inside to take a bath. He later testified that the complainant was only briefly at home, spending most of her time at her maternal aunt's (Y…'s) home watching cartoons and only coming home to eat. She would leave home when her mother left for work, watch cartoons, only return much later in the day and then wake her sister up. He would only ever be alone with the children for a few minutes and never spent a great deal of time with the complainant.

Applicable law

[30] It is accepted that the evidence of young children should be accepted with great caution. While no fixed rule in respect of corroboration is applicable, in *S v Manda*, the Appellate Division noted inherent dangers in relying upon the uncorroborated evidence of a young child.[1] The imaginativeness and suggestibility of children have been held to be only two of several elements that require that their evidence be

[1] 1951 (3) SA 158 (A) at 162E-163F. See *S v Artman and Another* 1968 (3) SA 339 at 340H.

scrutinised with care to the point of suspicion.[2] A trial court must fully appreciate the inherent dangers in accepting such evidence.

[31] In addition, the complainant in this matter is a single witness. S 208 of the Criminal Procedure Act, 1977 ('the Act')[3] provides that an accused may be convicted of an offence on the single evidence of any competent witness. There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness.[4] The evidence must be weighed by considering its merits and demerits before deciding whether, despite shortcomings, defects or contradictions, the truth has been told. The cautionary rule that the evidence of a single witness must be clear and satisfactory in every material respect does not mean that any criticism of that witness' evidence, however slender, precludes a conviction.[5] The exercise of caution cannot be allowed to displace the exercise of common sense.[6] The court is entitled to convict on the evidence of a single witness if it is satisfied beyond reasonable doubt that such evidence is true, and notwithstanding that the testimony was unsatisfactory in some respect.[7]

[32] An accused person may only be convicted if, after proper consideration of all the evidence presented, his guilt has been established beyond reasonable doubt. It follows that an accused person must be acquitted if it is reasonably possible that he might be innocent.[8] Before rejecting an accused's version on the probabilities the court must be able to find, as a matter of probability, that the accused's version is simply not reasonably possibly true.[9] Where there is a conflict of fact between the evidence of the state witnesses and that of the accused, the court is required to consider the merits and demerits of the state and defence witnesses, as well as the probabilities of the case, before concluding whether the guilt of an accused has been established beyond reasonable doubt.[10]

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[2] *Ibid*.
[3] Act 51 of 1977.
[4] *S v Weber* 1971 (3) SA 754 (A) at 758.
[5] *R v Bellingham* 1955 (2) SA 566 (A) at 569, quoting *R v Nhlapo* (AD 10 November 1952).
[6] *S v Sauls and Others* [1981] 4 All SA 182 (A) at 187.
[7] *R v Abdoorham* 1954 (3) SA 163 (N) at 165, as quoted in *S v Sauls supra*.
[8] *S v Van Aswegen* [2001] JOL 8267 (SCA); *S v Van der Meyden* 1999 (2) SA 79 (W).
[9] *S v Shackell* 2001 (2) SACR (SCA) 194*g-i*.
[10] *S v Guess* [1976] 4 All SA 534 (A) at 537-538; *S v Singh* 1975 (1) SA 227 (N) at 228.

Assessment of evidence

[33] Dr Gcolotela was a good witness, able to present her findings with clarity and answering all questions openly. She did not hesitate to explain the limitations of her medical assessment, explaining, for example, that she had not been able to obtain a medical history from the complainant herself. She also readily conceded when certain explanations for her conclusions could not be eliminated. Her opinion was based heavily on her finding that the complainant's hymen was irregular, which was strongly suggestive of perforation and sexual penetration, despite the absence of any visible cleft.

[34] The complainant testified with some difficulty, becoming emotional on various occasions, particularly when confronted with the accused's version and with contradictions in her version of events compared to her mother's recollection. Despite these challenges, she listened carefully to the questions put, and appeared to think about her answers before speaking. For example, she spent time thinking about what was put to her about her mother's testimony that L… had stayed with them for a week during the lockdown period. She initially testified that she could not recall, thought further and then indicated that L… had been there before the onset of Covid-19 before leaving. Overall, she seemed to recall the events of the time clearly and had no difficulty in indicating when she disagreed with a statement put to her, even if she was told that this statement originated from her mother. On occasion she indicated when she did not recall something, such as the date when the accused had returned to work whilst they were together in Mdantsane. She spoke confidently and was able to go beyond short-worded answers in conveying her thoughts when she thought this was necessary. She also remembered details of each of the alleged instances of rape. On the first occasion, the accused had instructed the other children to play outside before turning his attention to her. On the second occasion, the children had been outside, and she had been washing the dishes when she was approached by the accused. On the final occasion, the other children had been at their crèche. She

was also able to testify openly about matters that might cast her own conduct into doubt. For example, she explained that she had not told her mother that she had been raped three times because her mother had been crying, and she had not told her older sister even when she had been at home. She also admitted not having told her mother about any pain even when her mother was washing her.

[35] As the social worker's report suggested, the biggest weakness in her evidence related to her inability to recall specific times and dates. For example, when asked about when B… had stayed at their home in Nompumelelo, the witness responded with reference to the school closure, elaborating that he had been employed, lost employment and then left, but without a proper sense of time and date being provided. As a result, her evidence that her sister was present before the onset of Covid-19 and that she had then left, as well as her denial that the accused had been working until 12 April 2020 must be treated with circumspection in respect of the timing of these events. The child was also unable to recall when she had been raped or when the accused had given her money, although these matters were linked in her mind. She also interpreted some questions erroneously and was occasionally over-hasty in refuting the accused's version on a point. For example, when advised that the accused would testify that there had been people sitting outside his house drinking beers, which he sold together with cigarettes, the witness responded that he was lying and that none of those people *were entering*, something she had not been asked. When it was put to her that he had been outside most of the day to watch for the police, she again replied that the accused was lying. Rather than support this absolute denial, however, her follow-up explanation clarified that on occasion he would be inside the house.

[36] Despite these shortcomings, and bearing in mind the various cautionary notes to be struck, I find that the complainant made a favourable impression as a witness who spoke openly based on her own recollection of what had transpired. She was certainly not merely conveying a story she had been told. Her identification of the accused as her assailant was unquestionable. She was upset when confronted with the accused's version but had no difficulty in making statements that might have been to his favour. For example, the witness confirmed that he had been selling cigarettes during the lockdown period and that other adults had been in the vicinity. Despite the

shortcomings identified, I am satisfied that the evidence she presented was guileless and that of a child speaking truthfully.

[37] N… M… also made a favourable impression as a witness, testifying openly about the breakdown of her relationship with the accused and the reasons for this. She acknowledged when her words had been ill-chosen, or when her recollection of dates may have been mistaken. She conceded that she had failed to notice any injuries to her daughter while bathing her and indicated that she could not provide an indication of how many times per week, on average, she would have bathed the child before work at that time. Her demeanour and responses were certainly that of a witness speaking candidly. Mr Sojada, counsel for the accused, made much of an apparent contradiction between what the witness testified in chief compared to her testimony during cross-examination, but I am not convinced that her uncertainty stemmed from a clearly put proposition. In response to a clarifying question from the bench, the witness did not hesitate in confirming her original answer, adding that M… had been present at the same time.

[38] I accept that the accused worked until 12 April 2020 and that he would not have been alone with the complainant until that time. The same position applies once the accused returned to work on 6 June 2020, and there is no allegation of rape once the move to Mdantsane had taken place at the end of May 2020. The accused denied raping the complainant during his testimony. While he was unshaken on this score, his testimony offered several examples of a person determined to refute any suggestion of impropriety. Particularly telling was the number of statements he made that had not been put to either the complainant or her mother. The following examples are illustrative. He initially testified that he would help N… M… to bath his children, including the complainant, before taking them to crèche. L… had stayed at their home for a substantial period, rather than with his sister as per the normal arrangement, because of N… M…'s concern about financial implications and burdening somebody else. N… M… had chased M… away because she had to purchase extra groceries for her. At that time, during April 2020, she had been sharing a bed with L…. B… had lived with the family for over three months. Lu… would visit the house early in the morning before N… M… departed to work. Part of the reason for her wish to move to Mdantsane with the accused related to a clash

between L… and the two youngest children about cellular telephone usage. The complainant had a good relationship with him right up to the point of his arrest, even carrying his backpack voluntarily when he returned home. Her father had arrived during May 2020.

[39] His evidence was also contradictory in various respects. When asked about his daily situation during Covid-19, he initially testified that he and the children would all stay inside the house. He then added that they would be outside selling tobacco. Despite his earlier testimony, he confirmed during cross-examination that he had not bathed the complainant. His testimony included unnecessary detail of irrelevant material, such as his transportation arrangements to work, his promises to the complainant's father about communicating with him and N… M…'s difficulties during pregnancy. On other occasions, he appeared to be deliberately obtuse. He testified that he could not observe the complainant because he would come home only on weekends, even though it was common cause that he had been at home in Nompumelelo at least between 12 April until 31 May 2020.

[40] Perhaps most startling was his theory, put to N… M… but which was not part of his examination-in-chief, that the allegations had been concocted by N… M… to lead to the termination of their relationship. This version re-emerged during the accused's cross-examination, which included some incredible statements raised for the first time. L… was not only staying at their home at the time, but also slept the entire day until after 16h00. He and the other children would give her time to study and would sit outside, and he would only go inside to take a bath when she left the home. The complainant was only briefly at home when she needed to eat and spent most of her time at Y…'s home watching DSTV, leaving as soon as she woke up and only returning much later in the day. None of these statements were put to the state witnesses to that they could be addressed and seemed to me to be an afterthought designed to create the impression that the accused was never alone with the complainant.

[41] Considered in its entirety, the accused did not make a favourable impression as a witness. While some of these contradictions and inconsistencies might be minor in nature, this must be considered together with the other difficulties identified. His

failure to put a consistent, plausible version of the day-to-day events of the household at Nompumelelo during April and May 2020 created a negative impression.

Analysis

[42] It is necessary to adopt a holistic approach to analysing the available evidence in this matter.[11] In *S v Chabalala*,[12] the Supreme Court of Appeal explained this as follows:

'The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper count 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.'

[43] Many of the accused's utterances strike me, on their own, as being inherently improbable. The tapestry of evidence, when considered in its entirety, also depicts a different picture compared to his version. The starting point is the confirmation that the child was sexually penetrated. While the reason for the complainant's vaginal discharge may be uncertain, the medical evidence presented, coupled with the complainant's own testimony,[13] confirms beyond reasonable doubt that the complainant was the victim of sexual penetration.[14] A blunt object perforated her hymen and penetrated her vagina some time before she was examined by Dr Gcolotela.[15] As will be explained, the clinical findings contained in the J88 slot in with the mosaic of facts which have ultimately been found to have been proved.[16]

[44] N… M… was the main breadwinner for her family at the time of the lockdown. Her oldest child was at boarding school and returned home. The accused accepted that L… had a good relationship with his sister. Given the size of their dwelling and

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[11] *Van Aswegen supra*.
[12] 2003 (1) SACR 134 (SCA) para 15. Also see *S v Dlamini* 2019 (1) SACR 467 (KZP) para 25.
[13] See *S v Heroldt* 2018 (2) SACR 69 (KZP) para 16.
[14] See *Dlamini supra* para 26. *Cf S v MM* 2012 (2) SACR 18 (SCA) para 22.
[15] Any suggestion of self-infliction or other possibilities for the complainant's condition at the time of her examination are no more than speculation. See the remarks in the minority judgment of Heher JA in *S v MM supra* para 31.
[16] *Heroldt supra* para 17.

sleeping arrangements, L…'s relationship with Lihle, the testimony of the complainant and that of N… M…, I accept that L… spent much of the April-May 2020 period staying with Lihle. Having considered all the evidence on this point, the probabilities favour her having spent a period of only a week or so living with her immediate family, but not more, during that time. M… had stayed for a short period of time while she was unemployed. On the accused's own version, L… had slept with M…, and M… had only been present during April 2020. B… had also remained for a fortnight or so, most probably at the end of March and early April 2020. The complainant's father had not visited for long. Lu… had only visited twice per day for meals and had not been present for much of the time that N… M… was at work. While there were other adults in the vicinity and relatives who would visit, and even stay for periods of time, the accused's suggestion that he was never alone with the complainant, or only alone with her and the other younger children on rare occasions, is not supported by the evidence. This is especially so in respect of May 2020 during the times that N… M… was at work, and the accused's version in that respect cannot be reasonably possibly true.

[45] The accused's version that he was a victim of a convoluted scheme hatched by N… M… to terminate their relationship is likewise not reasonably possibly true. N… M… had no difficulty in confronting the accused openly to terminate their relationship at the end of May 2020 when she wished to move to Mdantsane with her children. She had agreed to give the accused a chance to repair their relationship, but there can be no suggestion that she needed to create an excuse to leave him. Why she would then choose to utilise the complainant as part of a diabolical scheme to accuse an innocent person of multiple acts of rape, simultaneously protecting another individual, remained unexplained. Given the available medical evidence, the suggestion can only have been that she had concocted her plan after the child had been examined and found to have been penetrated. This is entirely improbable.

[46] N…M…'s testimony regarding the moment she enquired about the complainant's well-being, and the build-up thereto, must be accepted. While she may not have noticed any physical signs of discomfort or pain after the child had been penetrated, even when washing the child, she eventually observed behavioural change. On 7 July 2020 her sense of concern resulted in pointed questions about

whether the child had been touched by a male person, also on her private parts. There is nothing untoward in this interaction in my view.[17] Even though not totally spontaneous, the complaint was not made in response to suggestive questions of a leading and inducing or intimidating character.[18] The witness did not suggest to the child that her stepfather figure had raped her or planted a seed to that effect. In fact, rape itself was not suggested by the mother. She made enquiries about a young child as any worried parent would. Her belated suspicions were confirmed by her child and supported by the subsequent medical examination.

[47] The state's case rested heavily on the testimony of the complainant, who was a young child. Her evidence as a single, child witness must be approached with great caution.[19] In *Rex v Manda*,[20] various reasons were provided as to why the evidence of children should be 'scrutinised with care amounting, perhaps, to suspicion'.

[48] I am also mindful that there was a delay of between six weeks to three months in making the complaint to her mother.[21] This, on its own, does not necessarily warrant an adverse inference.[22] S 59 of the b Offences Act provides that in criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.[23] The reason for this statutory

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[17] *R v Osborne* [1905] 1 KB 551 at 561.
[18] *R v C* 1955 (4) SA 40 (N) at 40G; *S v MG* 2010 (2) SACR 66 (ECG) at 73.
[19] See *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A) at 1028E-F; *S v Dyira* 2010 (1) SACR 78 (E) at 86*d-e*. On the relationship between cautionary rules and the constitutional fair trial rights of an accused, see PJ Schwikkard and SE van der Merwe *Principles of Evidence* (4th Ed) (Juta) 598. Courts may, however, not treat evidence of a complainant with caution on account of the nature of the offence: s 60 of the Sexual Offences Act.
[20] 1951 (3) SA 158 (A) at 163. The South African Law Commission has, however, recommended the abolishment of the cautionary rule relating to children: Schwikkard and Van der Merwe 594. Also see P J Schwikkard 'Sections 58-60 and amendment in terms of s 68(2): Matters pertaining to evidence' in D Smythe and B Pithey *Sexual Offences Commentary* (Rev Service 3, 2021) 23-10, citing research demonstrating awareness amongst social scientists on problematic perceptions of children's evidence in comparison to adults.
[21] S 58 of the Sexual Offences Act provides that evidence of a previous consistent statement made by a complainant is admissible in criminal proceedings involving the alleged commission of a sexual offence.
[22] See Schwikkard 23-5.
[23] *Cf S v Dyira* 2010 (1) SACR 78 (E), dealing with an appeal against conviction in a matter heard by the trial court prior to the enactment of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007) ('Sexual Offences Act'), and with earlier authorities. The judgment has been criticised for overlooking or misapplying the Sexual Offences Act: Schwikkard 23-5, fn 5.

provision is to ensure that presiding officers do not unjustifiably draw an adverse inference only due to a reporting delay, and without proper consideration of psychological and other factors that might have contributed to this.[24] S 59 should not be unduly interpreted as still requiring that the complaint be made at the first reasonable opportunity.[25] In this case, for example, the complainant indicated that she had not only been threatened but also bribed by the accused to maintain silence. She also testified that she was scared her mother would hit her if she found out what had happened, and I accept her evidence in these respects.

[49] Confirming this approach, in *S v Vilakazi* Dambuza JA, on behalf of the majority of the court, held as follows:[26]

'Firstly, as Milton states, reluctance on the part of rape survivors, or some of them, to report the rape at the first opportunity is a firmly recognised fact. It is also generally accepted that with young children the reluctance is compounded. In this case the complainant testified that she was afraid of the appellant. I am persuaded that the prospect of accusing her mother's friend who used to assist her in her studies must have compounded the fear.'

[50] In appropriate circumstances, however, other considerations may well necessitate an adverse inference being drawn. Factors that may be relevant include the nature of the complaint, its time, place and surrounding circumstances, any inconsistencies, retractions, or a change of mind.[27] The shortcomings in the complainant's testimony have already been highlighted, notably with reference to issues of time. It must be recalled that the complainant completely denied that L… had been present during the time in question and that the accused had worked until 12 April 2020, even though these facts may be accepted on a conspectus of all the evidence.

[51] The favourable impression of trustworthiness created by the complainant during her testimony must also be highlighted.[28] This went beyond her demeanour

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[24] DT Zeffertt and AP Paizes *The South African Law of Evidence* (3rd Ed) (LexisNexis) (2017) 483. See *Hotzhausen v Roodt* 1997 (4) SA 766 (W) at 778E. Also see Schwikkard ch 23-2-3.
[25] Schwikkard 23-5.
[26] *S v Vilakazi* 2016 (2) SACR 365 (SCA) para 19.
[27] Zeffertt and Paizes 481.
[28] See the suggested factors that contribute to a young witness' evidence being found to be trustworthy in *Woji supra* at 1028A-E.

and is based on my assessment that she testified truthfully about the core events of the time and to the best of her ability. This included her evidence that she had been raped by the accused three times. Her testimony regarding the associated details was clear and unequivocal and must also be accepted. The accused's *modus operandi* was explained by the complainant in court. He would use his position of power and familial relationship with the complainant to instruct her to undress and lie on the bed, after ensuring that none of the other children were present.[29] He would give her a rand or two after he had raped her and would threaten her with physical harm if she told anybody about his conduct.

[52] As indicated above, the complainant impressed the court as an honest witness to her ordeal. I was impressed by her ability to spontaneously speak her mind, generally recalling what had occurred after some thought and explaining matters by using her own words. I found her evidence to be largely reliable and there was no reason to believe that she had been coached or had implicated the accused because of her imagination, or to protect somebody else. Given the supporting medical evidence, there can be no suggestion that the child had imagined her penetration. As to the identity of the perpetrator, the young child herself identified the accused as the perpetrator on 7 July 2020, albeit without providing all the details. This was seemingly the first time she had been asked about her well-being in a way that made her feel comfortable to disclose what had happened, and she did so in broad strokes. Both mother and child would have been extremely emotional at the time, and understandably so, so that it is unsurprising that all details were not disclosed on that occasion. I accept that the delay in confiding to her mother was caused mainly by the complainant's fear of the repercussions, particularly that she would be hit. Her discussion with her mother on 7 July 2020 is admissible, showing consistency in her accusation,[30] without amounting to corroboration.[31]

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[29] S 57(1) of the Sexual Offences Act confirms that, notwithstanding anything to the contrary in any law contained, a male or female person under the age of 12 years is incapable of consenting to a sexual act.
[30] *Heroldt supra* para 20.
[31] *Vilakazi supra* para 15.

[53] The accused's testimony was fraught with the various difficulties already identified, creating an unfavourable impression overall.[32] While it remained for the state to prove his guilt, his denial of the allegations ultimately rested on a version of the surrounding circumstances that is simply not reasonably possibly true. Mr Sojada suggested that the accused had been prejudiced by the way the charge had been formulated, so that the accused could not provide a more specific account of his movements at times corresponding to the allegations. S 94 of the Act provides, however, that where it is alleged that an accused on diverse occasions during any period committed an offence in respect of a particular person, the accused may be charged in one charge with the commission of that offence on diverse occasions during a state period. That is precisely what has occurred in this instance and the suggestion of prejudice must be rejected. The failure to specify dates and times when the alleged offences occurred does not render the charge defective. The accused had sufficient information to be able to plead and clearly appreciated the case that he had to respond to.[33]

[54] Having carefully considered the evidence in its entirety, including the merits and demerits of all the witnesses and the inherent probabilities of their testimonies, and whether the accused's version is reasonably possibly true, I am satisfied that the state has proved beyond reasonable doubt that the accused is guilty as charged.

Order

1. The accused is found guilty of the crime of rape as charged.

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A. GOVINDJEE

JUDGE OF THE HIGH COURT

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[32] On the ability of a court to find satisfaction of a cautionary rule in the poor quality of the evidence of an accused person, see *Dyira supra* para 12.
[33] See *S v Hugo* 1976 (4) SA 536 (A) at 540E as cited in *Vilakazi supra* para 21.

Date heard: 07 February 2022

Date delivered: 21 February 2022

Appearances:

Counsel for the State:	Adv S. Hendricks Director of Public Prosecutions Makhanda 046 602 3000
Attorney for the Accused:	Mr V. Sojada Legal Aid South Africa Makhanda 046 622 9350