



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

NOT REPORTABLE

Case no: 42/2021

In the matter between:

THE STATE

And

XOLANI NKEWU

ACCUSED

JUDGMENT

Govindjee J

Background

[1] Mr Nkewu pleaded not guilty to a charge of rape. It is alleged that on or about 26 October 2020 he unlawfully and intentionally committed an act of sexual penetration with the complainant, a nine-year-old female ('the complainant' / 'S'), by inserting his penis into her genital organs without consent.¹

¹ The charge originally made reference to insertion of the accused's penis into the vagina of the complainant. Considering the evidence adduced, the charge was formally amended during the

[2] It is common cause that Mr Nkewu visited the home of the complainant and her mother ('N') on the night in question. He had previously been involved in a relationship with N but they had not been in contact for over a year. He had been consuming alcohol since early that afternoon. He conversed with N for between 30 to 45 minutes before falling asleep on a single-seat couch in the lounge. He awoke as a result of being assaulted by N and some of her family members. What is in dispute is whether he raped S, who was sleeping with her sister ('O') in their mother's room ('the main bedroom'), sometime between falling asleep and being woken up and assaulted. It is common cause that the complainant was taken to Dora Nginza Hospital for medical examination on 26 October 2020.

The evidence

[3] S is now ten years of age. She testified through an intermediary and interpreter and following admonishment. She had a good relationship with Mr Nkewu, who was a very close friend of her mother. The child had fallen asleep in the main bedroom, and had been joined in bed by her sister. She heard a knock on the front door of the home and the voice of the accused. She woke up and saw Mr Nkewu, who entered the other bedroom of the house ('the other bedroom'), to converse with her mother. It had been some time since he had visited their home. Mr Nkewu told her mother that he had found work, and requested a place to sleep. He was told to sleep on the couch.

[4] After some time, Mr Nkewu entered the main bedroom. The complainant was sleeping and it was dark. He told her to climb on top of him. She indicated she did not want to do so. He then pulled her and placed her on top of him, pulled down her panties, lowered his pants, lifted her nightdress and moved her up and down, also holding onto her buttocks. The complainant made use of dolls to demonstrate that she was in a horizontal position above Mr Nkewu, and to illustrate the up and down

proceedings in terms of s 86 of the Criminal Procedure Act, 1977 (Act 51 of 1977) ('the CPA') to replace the words 'genital organs' for 'vagina'. The trial proceeded accordingly in terms of s 86(3) of the CPA. The charge sheet was also amended prior to closing arguments to correct the age of the complainant at the time of the alleged rape.

moving motion she had described. This resulted in her experiencing pain in her urinating organ and in the area of her lower stomach. Mr Nkewu had inserted his penis into her urinating organ and she started crying.² O woke up and asked her why she was crying. S told her that Mr Nkewu had caused this. O asked her to accompany her to the toilet. Mr Nkewu had been holding her wrist and released her when she told him that she needed to urinate. The two children then went to their mother and the matter was reported.

[5] The complainant also testified that Mr Nkewu had thrown her panties onto the ground after removing them. She had recognised his voice when he had instructed her to climb on top of him. She had told her sister some of what had happened. At one point she testified that the complainant had wanted to rape her. When asked what she meant by this, the complainant was unable to explain further, only adding that the accused had 'wanted to do something wrong to me that I have never done'.

[6] Under cross-examination, the complainant testified that she had heard her mother instruct O to sleep with her before Mr Nkewu's arrival. Her statement to the police had indicated that O had joined her only after his arrival. She clarified that she had heard Mr Nkewu move towards the other bedroom upon arrival, because he was speaking. She had not seen him in that room.

[7] The complainant had been sleeping in the main bedroom when Mr Nkewu entered it. He had whispered that she should climb on top of him. After refusing to do so she had fallen asleep but he had pulled her on top of him and held her tightly. She had been awake when he then removed her panties while she was on top of him and threw them on the ground. He had undressed himself by untying the button of his pants, and by lowering his pants and underwear. She had not noticed him wearing any belt. He had then moved her up and down. The complainant explained that Mr Nkewu had pushed and pulled her in this manner whilst holding onto her buttocks. She also indicated that he held her waist. She demonstrated, again with the

² The complainant mainly used informal words in the isiXhosa vernacular when referring to the male and female genital organs.

assistance of dolls, that her legs had been slightly open at the time, and that Mr Nkewu's legs had been together.

[8] When asked during cross-examination when she had started crying, the complainant commenced her response with the words 'after he inserted his thing in me'. She was unable to explain why she had felt pain but confirmed that she had experienced pain in her stomach and private area. O had been sleeping during this time and had only woken up when she had started to cry. At that point, S had been on top of Mr Nkewu, who did not want to release her. He had only done so after O had asked her to accompany her to the toilet, and after she had told Mr Nkewu that she needed to urinate.

[9] S's statement to the police, contrary to her testimony, had suggested some further discussion between her and O. She had omitted to include in that statement that O had suggested they should both go to the toilet. She confirmed that she had seen her mother go to the main bedroom once she had been woken. S had remained in the other bedroom and had not seen what had transpired thereafter.

[10] It was put to S that what she had described may have all been a 'bad dream' and initially said that this was possible. She proceeded to respond to each aspect of the accused's version emphatically, when this was put to her, reiterating the crux of her recollection of events. For example, when it was suggested that the accused had not removed her panty, she replied as follows:

'He took it off because it wasn't going to be taken off by itself and I didn't take it off myself.'

[11] She also had no difficulty in indicating when she did not know the answer to a question, for example in respect of which couch Mr Nkewu had been seated, or whether he had been sleeping or awake in the lounge. She carefully considered each statement put to her and her responses were, by and large, clear. The accused would not know that she had reported the matter to her mother after urinating because he was still in the main bedroom. As to his denial of the actual rape, she retorted:

'He wouldn't know anything because [he was] coming from a tavern on the day.'

On her understanding of rape, she later said the following:

'I think it means that a person inserts his penis into your vagina and moves you up and down.'

[12] During re-examination, the complainant clarified that she had not dreamt up the incident. She had woken up and observed what was happening to her. Regarding her statement about the tavern, she testified that the accused had been drunk.

[13] O, an 11-year-old child, testified through an intermediary and interpreter that she had slept with S that evening in the main bedroom, and that their mother was in the other bedroom. She heard a knock on the door and recognised Mr Nkewu's voice. The children had a good relationship with him but she had not seen him for a long period of time. Her mother told her to open the front door. She switched on the light and did so. Mr Nkewu was looking for a place to sleep and her mother allowed him to sleep on the couch. O had stood at the door to the main bedroom and overheard the conversation between her mother and Mr Nkewu. She also observed her mother seated opposite him on the other couch and then returned to the main bedroom.

[14] Later, she saw her sister crying and on top of Mr Nkewu. When asked, her sister told her that he was the cause of her tears. O then told her that they should go to the toilet. She again made an enquiry and her sister repeated only that Mr Nkewu was the cause of the problem. S did not have her panty on when they went to the bathroom. O then went to call their mother while S remained in the bathroom. She appeared to be scared and afraid, crying and shivering.

[15] O testified that Mr Nkewu appeared confused when woken from the bed in the main bedroom. His pants and underwear were by his feet when he rose from the bed. She confirmed S's testimony as to the position of each of the people in that bed at the material time. S had been in the middle of the bed. She had cried softly. O could not see what S and Mr Nkewu were doing, but had seen S on top of him. He had been pulling up his trousers when her mother had pushed him out of the house.

[16] During cross-examination, O initially maintained that she had seen Mr Nkewu sleeping on the couch, with his eyes 'slightly closed'. She then testified that she was not sleeping when Mr Nkewu entered the main bedroom, but was looking at the window. She had not fallen asleep 'that much', but had continuously closed her eyes. She was awake, she said, up to the time that she heard S crying. She also testified that she had woken up and 'wasn't sleeping that much'. When confronted with a statement she had made to the police in July 2021, suggesting that she had been in a deep sleep before she heard her sister scream, the witness conceded that she might now be mistaken. She also acknowledged that parts of her version had been influenced by what her sister had subsequently told her. She eventually admitted that '... the only thing that I saw was that S was on top of [the accused]. I didn't see anything else that happened.' She repeated this later in her testimony. O also testified that Mr Nkewu appeared to her to be drunk, because his eyes were red, he was not walking properly and could not stand.

[17] As is evident, O's testimony contained various material contradictions that bring the reliability of much of her testimony into question. She struggled to separate what she had actually observed from what she might have heard from other family members, notably when S gave her further details after returning from the hospital, or what she had imagined might have occurred. For example, she initially testified that she had seen her sister's panty on the bed. Later, she indicated she had seen it on the ground. Her evidence was fanciful at times. She suggested, for example, that she had been holding her sister under the blanket and had been woken when her sister's tear had struck her hand. She had peaked under the blanket, she said, to confirm that her sister was on top of the accused. She also testified in some detail about standing behind her mother when she confronted Mr Nkewu in the main bedroom. This had been completely omitted from her statement to the police.

[18] Mr Fezile Mtini, an employee at Dora Nginza Hospital, testified about his qualifications and extensive experience as a forensic nurse. He explained that he would not request any history when examining children below the age of 12. He preferred to conduct his own examination and arrive at an independent conclusion. He had examined the complainant in this matter but, given the number of examinations he conducted, had no particular recollection of this examination. His

testimony was based on the completed medical report form ('the report') that was accepted into evidence.

[19] The report reflected that the complainant was pre-puberty. There was a small cut observed 'at six o'clock' on the posterior fourchette, but the cut was not bleeding. This resulted in the witness confirming that tears had been observed. There was sensitivity in the area that had been examined, reflected in the report as 'increased friability', and typically confirmed by observing the comfort level of the patient during examination. The fossa navicularis was, as a result, described as 'sensitive to touch'.

[20] Mr Mtini explained that more harm would have been caused by further interior examination with the assistance of an object. The cervix was not examined. No swelling or fresh tears were observed. The perineum was intact. Mr Mtini's conclusions were reflected as follows:

'Injuries observed on the vestibule and small cut at fourchette are consistent with sexual penetration or attempt of.'

[21] A cut and bruises were pen-marked on the diagram appended to the report. The cut, drawn at the six o'clock position, was depicted as being 'not bleeding'. The two marks indicating bruises included the words 'very sensitive to touch'. These injuries were on the inside left and right side of the labia.

[22] Mr Mtini testified that while many things might have caused a cut, such as scratching, the bruising depicted required an amount of force to be applied. Although difficult to state with any level of precision, that bruising would have been caused within 72 hours of the examination. Mr Mtini explained that he understood the injuries that he had observed to have been caused by penetration. Those observations were consistent with the insertion of a penis into the genital organs of the complainant. It is common cause that the result of a DNA sample taken from the complainant and sent for examination detected no semen.

[23] The witness confirmed during cross-examination that the hymen was intact and that a penis could not have entered the vaginal opening. It was suggested by counsel for Mr Nkewu that the bruising may have been caused by a straddle injury.

The labia majora and labia minora were described in the report as 'normal'. The bruising described and indicated in the diagram had been observed on the inside of the labia, and must have been caused by application of force. This would not, for example, have been the result of excessive force applied when wiping the area after urination. Mr Mtini testified that he considered it to be impossible for the complainant to have caused such bruising through the application of such force by the child herself.

[24] Ms N, the complainant's mother, testified that she had been in a relationship with Mr Nkewu between 2017 and 2018. She had been sleeping in the other bedroom on the night in question because S and O were sleeping in the main bedroom. Mr Nkewu had arrived at her home while she was sleeping. It had been over a year since she had last seen or been in contact with him and he had never previously stayed at her home.

[25] The children accompanied her to open the door for Mr Nkewu and were excited to see him. They all loved him and he had always shown care for them. Mr Nkewu was drunk, could not stand and was reeking of liquor. The children asked him what gifts he had brought for them and he promised to bring something for them the next day.

[26] A lengthy discussion ensued between Mr Nkewu and N in the other bedroom. He requested a place to sleep and, when this request was refused, stated he could sleep on the couch. O and S went into the main bedroom and N went to the other bedroom, after switching off the lights and closing the door of the main bedroom. Mr Nkewu was sleeping on the couch he had been seated in when N left that room.

[27] After approximately an hour, N was woken by O to be told that S was crying. S was standing behind O and, when asked, said only that Mr Nkewu was the cause of this. N went to the main bedroom and found Mr Nkewu sleeping there, with the light off. She turned the light on. N's sleeping position was described. His head was towards the wall and his feet were hanging over the bed. He was uncovered by any blanket. His pants and underpants were in a lowered position by his ankles and his shoes were still on his feet. His lower body was visible and he was asleep. N asked

Mr Nkewu why he was sleeping in the main bedroom when she had left him in the lounge. She pulled him from the bed using force and he fell down at the foot of the bed near the main bedroom door.

[28] N, aided by Mhlali, subsequently assaulted Mr Nkewu using a pan from the kitchen. Mr Nkewu tried to lift his pants during this time. No belt had been observed. He eventually managed to leave the house. A whistle was blown and the community alerted. O and S stood with a neighbour while community members arrived. Mr Nkewu was on the ground and assisted by his brother, who lived nearby. N now asked S what had happened to her. She did not answer and just cried. The police arrived and removed Mr Nkewu from the scene. N observed S carrying her panty at some point after her fight with Mr Nkewu.

[29] N took S to Dora Nginza Hospital for examination. S again refused to tell her what had occurred. A social worker spoke to S and informed N about the discussion. S now confirmed that she had told the social worker that Mr Nkewu had taken out his private part and asked her to sit on top of him. The person who examined the child utilised pictures of female genitalia to explain to N what sexual penetration would look like. She also viewed the genital area during that examination and observed bruises and redness inside one side of what she described as 'the vagina' during the examination.

[30] During cross-examination, N indicated that Mr Nkewu had told her that it was between 03h00 and 04h00 when he had arrived. She had opened the door. He entered the other bedroom before they stood in the lounge. They spoke for approximately an hour at that time. Her statement to the police suggested that S had told her what had occurred before they met the social worker. She testified that that portion of her written statement was not a reflection of what had occurred, and contained information she had heard from a neighbour. It was also pointed out that various portions of her testimony, such as the children requesting gifts from Mr Nkewu and her closing of the main bedroom door, were not contained in her written statement.

[31] Mr Nkewu testified in his own defence. He is 40 years of age and presently unemployed. He earns R1500 per month by renting out his home and staying elsewhere. He has no previous criminal convictions and there are no pending cases against him.

[32] He had been drinking with four friends since early in the afternoon on the day prior to the alleged rape and consumed four to five quarts of Castle Lite beer. He visited N's home at approximately 19h00. He had been walking with his friends and observed that the lights of her residence were on. He wanted to tell N that he had returned from Cape Town.

[33] O and S opened the door and he entered. He asked about N. He sat in the lounge and spoke to N, who was lying on the bed in the main bedroom, through the open door. He never entered that room and never asked for a place to sleep. They spoke about his Cape Town trip and he fell asleep on the couch. He was drunk.

[34] Mr Nkewu testified that he woke up on the couch where he had fallen asleep. It was approximately 03h00. He was now being assaulted by N and other members of the household. He asked them what he had done and was told that he had raped S. He was wearing his clothes, including a pair of jeans and a belt. He denied the state witnesses' versions of events without further elaboration. He had only fallen in the living room, and not in the main bedroom when assaulted. He had not raped S.

[35] Mr Nkewu suggested that N had concocted the allegations because she was bitter that their relationship had ended and hated him. He had previously chased her away from his house during 2018, when she would arrive there drunk. He admitted, however, that the relationship had subsequently normalised.

[36] During cross-examination, Mr Nkewu stated that N had been cheating on him and he had ended the relationship during 2019. He had slept at her home on more than five occasions. He had been in Cape Town only between June and August 2019 and had not had any contact with N or her family until the incident occurred during October 2020. He had been in Zwile during that time, since returning from Cape Town. He admitted that he had been drunk when he arrived at N's home. He

indicated that it was understandable that O might have thought he had come from the nearby tavern given his state of sobriety. But he denied staggering or being very drunk. Mr Nkewu maintained that N had been lying on a bed in the main bedroom while he sat on a couch in the lounge while they talked for between 30 to 45 minutes. They were at peace with one another and did not argue. Their conversation was amicable and there was no tension. While he could not recall everything they spoke about, he was convinced that the discussion was not about their break-up or relationship.

[37] S and O had slept in the other bedroom. They had been excited to see him and asked him what he had brought for them. He had a good relationship with them. He conceded that it would be strange for them to subsequently decide to turn on him and falsely accuse him of rape. He suggested that S and O had been told by N to say that he had raped S. He later stated that it was N that had taken off his belt and removed his pants when they were wrestling outside the house. She was shouting and wanted to cut his genitals off with a school scissor. He had spent three days in hospital as a result of being assaulted, suffering injuries near his eye, his wrist and an open scrotum.

[38] Mr Nkewu did not dispute the injuries described by Mr Mtini on S's genital organs during his cross-examination, but maintained that those injuries were not caused by him. He had been sleeping on the couch and never set foot into the main bedroom. He did not know what had caused the injuries.

[39] During re-examination, Mr Nkewu conceded that he might have been mistaken about which room N had been seated in during their conversation and that he might have forgotten these details.

Overview of the legal position

[40] Any person who unlawfully and intentionally commits an act of sexual penetration with a complainant, without that person's consent, is guilty of the offence

of rape.³ 'Sexual penetration' is defined by the Sexual Offences Amendment Act to include any act which causes *penetration to any extent whatsoever* by the genital organs of one person into or beyond the genital organs of another person.⁴ 'Genital organs' is defined by that Act to include 'the whole or part of the male and female genital organs'.

[41] It is trite 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.⁵ The imaginativeness and suggestibility of children have been held to be only two of several elements that require that their evidence be scrutinised with care to the point of suspicion.⁶ A trial court must fully appreciate the inherent dangers in accepting such evidence.

[42] Section 208 of the Criminal Procedure Act, 1977⁷ 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.⁸ 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.⁹ It has repeatedly been said that the exercise of caution cannot be allowed to displace the exercise of common sense.¹⁰ 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.¹¹

³ S 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007) ('the Sexual Offences Amendment Act').

⁴ S 1 of the Sexual Offences Amendment Act (own emphasis).

⁵ 1951 (3) SA 158 (A) at 162E-163F. See *S v Artman and Another* 1968 (3) SA 339 at 340H.

⁶ *Ibid.*

⁷ Act 51 of 1977.

⁸ *S v Weber* 1971 (3) SA 754 (A) at 758.

⁹ *R v Bellingham* 1955 (2) SA 566 (A) at 569, quoting *R v Nhlapo* 1955 (3) SA 290 (A).

¹⁰ *S v Sauls and Others* [1981] 4 All SA 182 (A) at 187.

¹¹ *R v Abdoorham* 1954 (3) SA 163 (N) at 165, as quoted in *S v Sauls supra*.

[43] An accused person may only be convicted if, after proper consideration of all the evidence presented, their guilt has been established beyond reasonable doubt. It follows that an accused person must be acquitted if it is reasonably possible that they might be innocent.¹² Before rejecting an accused's version on the probabilities, the court must be able to find that the accused's version is simply not reasonably possibly true.¹³ 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.¹⁴

[44] Finally, it is necessary to adopt a holistic approach to analysing the available evidence.¹⁵ In *S v Chabalala*,¹⁶ 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.'

Analysis

[45] N made a particularly favourable impression as a witness, speaking in a clear and forthright manner and readily conceding when she may have been mistaken. She was able to explain minor inconsistencies between her testimony and her statement to the police without difficulty. Much of her evidence on the material issues must be accepted as reflecting what occurred in the early hours of 26 October 2020, particularly when considered together with all the evidence adduced. At some point she was woken as a result of Mr Nkewu's visit. She had not seen or heard from him

¹² *S v Van Aswegen* [2001] JOL 8267 (SCA); *S v Van der Meyden* 1999 (2) SA 79 (W).

¹³ *S v Shackell* 2001 (2) SACR (SCA) 194*g-i*.

¹⁴ *S v Guess* [1976] 4 All SA 534 (A) at 537-538; *S v Singh* 1975 (1) SA 227 (N) at 228.

¹⁵ *Van Aswegen supra*.

¹⁶ 2003 (1) SACR 134 (SCA) para 15. Also see *S v Dlamini* 2019 (1) SACR 467 (KZP) para 25.

for over a year. He was drunk. They conversed for approximately 45 minutes, either in the lounge or in the other bedroom, or in both spaces. The discussion was cordial and general. At some point Mr Nkewu fell asleep on the couch and N left him sleeping there. Sometime later, and still during the early hours of 26 October 2020, she was woken by O. S was crying and Mr Nkewu was mentioned as being the cause of this. N rose from the other bedroom and went to the main bedroom. She switched on the light and found Mr Nkewu sleeping there. His pants and underpants were lowered towards his ankles. A fight ensued, which continued outside the home, and Mr Nkewu was assaulted by N, family and community members.

[46] S also testified clearly on the material aspects of what had occurred. She was subjected to lengthy cross-examination and withstood much of this despite her tender age, speaking openly and with the assistance of dolls to demonstrate what had occurred in the main bedroom. Very occasionally she was unable to provide an answer. Her evidence remained largely consistent, although there were minor discrepancies, detailed above, with the statement she had made to the police. She was woken from her sleep when Mr Nkewu visited her home in a drunken state. She had a good relationship with him. She heard him speak to her mother. Mr Nkewu entered the main bedroom and told her to climb on top of him. When she did not do so, he pulled her on top of him in a horizontal position. He then lowered and removed her panties, lifted her nightdress, lowered his pants, inserted his penis into her genital organs, and moved her up and down while holding onto her buttocks, causing her pain. Her panties were thrown to the floor. She started crying and O woke up while she was still on top of Mr Nkewu. They left the room and went to wake N up. Her evidence during cross-examination clearly reflected that Mr Nkewu had inserted his penis inside her. When considered together with her testimony as a whole, it must be accepted that that insertion occurred in the area of her genital organs.

[47] As indicated, O was not a good witness and much of her testimony appears to have been clouded by subsequent events. As a result, some of the details she provided cannot be accepted. Her evidence does, however, confirm certain aspects of the testimony of both S and N. Her testimony supports the finding that Mr Nkewu was intoxicated, which he admits. She and S had been sleeping in the main

bedroom when he arrived and went back to sleep there while he conversed with their mother. She was woken up by her sister crying and saw her sister on top of Mr Nkewu. She went with her sister to alert their mother, who was sleeping in the other bedroom. Her mother proceeded to the main bedroom, where Mr Nkewu was found.

[48] It follows that S is a single witness to her alleged rape. She was also only nine years old at the time and her evidence must be treated with caution bordering on suspicion. Given her age, there are inherent dangers that she may have been susceptible to suggestion or imaginative about what actually transpired. Although no fixed standard has been settled, and each case must be decided on its own merits, it has been suggested that courts may be guided by various considerations in sexual offence matters involving a single child witness, including:¹⁷

- a) The competence of the witness;
- b) Any corroboration of the child's evidence;
- c) Contradictions in the evidence, also when considering previous statements;
- d) The manner in which the child gives the evidence;
- e) Consistency;
- f) The probability of the child's version;
- g) Consideration of the child's testimony in the light of the evidence as a whole.

[49] S demonstrated that she was capable of intelligent observation and recollection of the material events. She was able to understand the questions put to her by both counsel, with the assistance of an intermediary and interpreter, and framed her answers intelligibly. She recalled key aspects, such as her panties being thrown onto the floor, and had no difficulty in reiterating such details when probed. Her testimony consistently explained what she had experienced. She spoke openly and clearly and was able to describe and demonstrate her recollection of events. On a conspectus of all the evidence, and despite the minor shortcomings indicated, and the cautionary note to be struck, I have no doubt that she was speaking truthfully. The contradictions and omissions are of the kind that might be expected of a young

¹⁷ See *Vilakazi and Another v The State* [2021] ZAGPPHC 479 para 32.

witness testifying about a traumatic experience that occurred more than eighteen months ago. Her testimony is supported by the evidence as a whole, particularly the fact that N found Mr Nkewu without his pants and underwear asleep on the bed in the main bedroom in the early hours of the morning. It is also supported by the testimony of O, to the limited extent already indicated. The pain described by S in her private area is evinced by the results of the medical examination that was conducted later that day. While she may not have been able to immediately link her pain to Mr Nkewu's conduct, the reality is that she experienced this pain when she had been pulled on top of him. The results were evident when she was subsequently examined. S had suffered a small cut or tear on the posterior fourchette and bruises that were very sensitive to the touch on parts of the genital organs. Mr Mtini's testimony was that these injuries, when considered together, were suggestive of penetration. His observations were consistent with the insertion of a penis into S's genital organs, just as she testified.

[50] Mr Nkewu offered little other than a bare denial to refute the charge. His version included key aspects that were not put to the state witnesses. For example, the court heard for the first time during his testimony that he had returned from Cape Town in August 2019 and had been residing in Zwile. His suggested arrival at approximately 19h00 and claim that he had slept over at N's home on more than five occasions in the past were also raised for the first time. Moreover, the cross-examination of the state witnesses accepted that S and O had been sleeping in the main bedroom at all material times, and that N had slept in the other bedroom. Mr Nkewu discarded that acceptance during his testimony and vehemently maintained that he had spoken with N while she lay on her side on a bed in the main bedroom that was visible from his position on the couch. This despite his counsel having put to S that both couches could not be visible from the bed in that room, and the photographic evidence accepted into evidence that confirm that reality. He was clearly mistaken in that respect, and conceded as much when pressed by his own counsel on the point.

[51] Mr Nkewu's testimony was also littered with suggestions that, when considered in the light of the other available evidence, are so improbable that they must be rejected outright. The suggestion that he had arrived at 19h00 was not put

to N and, considering that it is accepted that the entire household was asleep at the time of his arrival, is unlikely. Even though the home may have been small, it is also difficult to fathom how he would have conducted a 30- to 45-minute discussion with N while she remained in a bedroom and he was in the lounge, with sleeping children in the vicinity.

[52] His version also changed over time. The version initially offered on his behalf was that the complainant might have dreamt the entire episode. The evidence presented on behalf of the state, including the medical examination report, gainsays that suggestion. During his testimony, the finger was pointed at N. She had held a deep-seated grudge for more than a year, during which time she had not been in any contact with Mr Nkewu, and then somehow convinced her two young daughters to concoct an allegation of rape. Furthermore, this scheme must have been hatched in the early hours of the morning when Mr Nkewu appeared. This is because, on his own version, the children were excited to see him and asked what gifts he might have brought them when he arrived. There is no suggestion that anything was amiss in their minds at that point in time. Their relationship with Mr Nkewu was palpably good at that point. They then went back to sleep and he entered into a lengthy, convivial discussion with N. It is wholly improbable that sometime after the children went to sleep, N woke them and managed to convince them to falsely implicate Mr Nkewu by levelling an allegation of rape. Not content with that, it is then suggested that N diabolically proceeded to orchestrate a sustained assault that resulted in Mr Nkewu's hospitalisation for a period of three days, and included the community being alerted through the blowing of a whistle. This all after she had allowed him into her home late at night or early in the morning and left him sleeping on the couch with her sleeping children only a few metres away. That version, including the suggestion that he had been wearing a belt at the time of the incident, is not reasonably possibly true on my assessment of the evidence and must be rejected.¹⁸

¹⁸ Counsel for Mr Nkewu was constrained to argue, during closing arguments, that his error as to the rooms might suggest that he had thought he was having a sexual encounter with N, rather than S. Suffice to state that this was never Mr Nkewu's case and is purely speculative.

[53] As to the question of sexual penetration, the test is whether the evidence was sufficient to show beyond reasonable doubt that penetration occurred.¹⁹ While it is true that it has been held that abrasions and bruising of genital organs are no certain indication of penetration and may be consistent with external injuries alone, the facts of this matter differ in significant respects from that in *MM v The State*.²⁰ In that matter there was no testimony on the part of the examining medical practitioner and the complainant stated only that the accused had placed his penis 'on' her. The evidence of the complainant in this instance is markedly different, as described.

[54] Mr Mtini was somewhat uncertain when confronted by counsel as to what constituted sexual penetration and rape, and perceived some differences between the medical and legal standard for arriving at a conclusion on these issues. The legal position is clear. So-called 'full penetration' is not necessary for a rape conviction and the 'slightest penetration', or penetration of the complainant's genital organs 'to any extent whatsoever' is sufficient.²¹ In *Mtyala v The State*,²² the court went as far as to state that even the complete absence of visible injuries would not necessarily be determinative of the question.²³

[55] It may be reiterated that the complainant was a single witness to the rape, whose evidence has been treated with the level of caution already described, bordering on suspicion. This notwithstanding, my evaluation of her evidence is such that it must be accepted that Mr Nkewu sexually penetrated the complainant as defined in the Sexual Offences Amendment Act, that she experienced resultant pain that caused her to cry and wake her sister, and that the cut and bruises reflected in the medical examination report, and observed by her mother in the presence of the nurse, reflect precisely this. There is no basis whatsoever to support the suggestion that those injuries may have somehow been caused in a different fashion at precisely the time of the incident. That is pure speculation, devoid of any established basis and so improbable that it must be rejected as being not reasonably possibly

¹⁹ *MM v S* [2012] ZASCA 5 para 20.

²⁰ *Ibid.*

²¹ See *Vilakazi and Another v The State* (Unreported Gauteng Division, Pretoria, case no A177/2017) paras 36 *et seq.*

²² *Mtyala v The State* (Unreported, Gauteng Division, Pretoria, case no A183/14) para 13.

²³ Also see *S v F* 1990 (1) SACR 238 (A) at 248*g-i*.

true when considering all the circumstances.²⁴ The medical examination took place later the same day and the report is consistent with the complainant's testimony and with the finding that sexual penetration of the complainant's genital organs, however slight, has been proved beyond reasonable doubt. That is the only reasonable conclusion that can be reached. Considering the evidence in its totality, it is also a conclusion that accords with common sense.²⁵

[56] It follows that Mr Nkewu has unlawfully and intentionally committed an act of sexual penetration with S, without her consent, and is guilty of rape as per the amended charge.

Order

[57] The accused is guilty of rape as charged.

A. GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 23 May 2022

Delivered: 29 July 2022

Appearances:

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²⁴ See *S v Hadebe* 1998 (1) SACT 422 (SCA) 426e-h and *Van Heerden v S* (Unreported Free State Division, Bloemfontein case no A131/2019 paras 19 *et seq.*

²⁵ See *Seedat v S* [2016] ZASCA 153 on the limited effect of inconclusive DNA results in such matters.

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