

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

Case No. CC49/2021

In the matter between:-

THE STATE

and

ATHENKOSI MAPUMA

ACCUSED

JUDGMENT

BANDS AJ:

[1] Whilst the prevalence of sexual offences in our society, particularly against vulnerable children, women and men, continues unabated, and is nothing short of abhorrent, one must not lose sight of the fundamental principle of our law that, in a criminal trial, the state is required to prove the guilt of an accused beyond reasonable doubt.

[2] The accused, a twenty-nine (29) year old male, stands arraigned on two counts of rape. The charges brought against him are worded in identical terms and allege that *“upon or about 4 January 2021 and at or near Soweto-on-Sea within the district of Gqeberha, the accused did unlawfully and intentionally commit an act of sexual penetration with one [O.L.], a seven year old boy, by inserting his penis into his anus without his consent and against his will and did thereby rape him.”*

[3] The accused pleaded not guilty to the aforesaid charges, and declined to proffer any formal plea explanation, save to record, through his legal representative, Ms Theron, that his version would be put in full to the state's witnesses.

[4] At the time of the alleged commission of the offences, the complainant resided predominantly with his maternal grandparents in Soweto-on-Sea. The house in which he resided is located next door to the accused's family home, which the complainant frequently visited. It is common cause that the complainant shared a close bond with the accused's mother, to whom I shall refer as S.G.M. S.G.M. would often care for the complainant by providing for his basic needs, such as the provision of food and care in the evenings after work. Once or twice a month, the complainant would sleep over at the home of S.G.M. when his maternal grandmother was unavailable to look after him. 4 January 2021 was one such occasion.

[5] It is common cause that the erf on which S.G.M. resides consists of two immovable properties, the main house, a one-bedroom home, with an open plan kitchen and living room, in which S.G.M. resides (*"the main house"*), and a second smaller property, which is divided into two separate small rooms with the use of cardboard and 3-ply board (*"the accused's house"*). The two houses are situated approximately 12 paces in distance from each other, with the main door of main house facing that of the accused's house.

[6] At the time of the commission of the alleged offences, S.G.M. resided with her boyfriend in the main house, whilst the accused and his housemate, to whom I shall refer as N.N, resided in the accused's house on opposite sides of the partition. The accused and N.N. resided together with their respective girlfriends. It is further common cause that there is a make-shift doorway in the partition, allowing access from the one room to the other; and that if you are one side of the partition, persons on the other side are clearly audible.

[7] Photographs of the respective houses were tendered into evidence. Immediately apparent from the photographs of the main house is that it was built without a ceiling. Accordingly, the wall dividing the bedroom from the remainder of the house does not fully enclose the bedroom, given the significant gap between the

top of the dividing wall and the roof. This results in a lack of complete separation of the two spaces and does not act to prevent the passage of sound between the bedroom and the remainder of the house, which on the whole, has a small footprint. Entrance to the bedroom from the living room is gained through a blue wooden door, which is depicted as open in the photographs. The furniture in the living room, consists of two 1-seater wooden armchairs; one small 2-seater wooden couch with armrests; a wooden coffee table; and a TV stand, which houses a small television set and other personal effects. The bedroom door and the 2-seater wooden couch are approximately one-meter apart. The significance of this becomes apparent shortly.

[8] Four witnesses testified in support of the state's case. The complainant, who was 9 years old when he testified; the complainant's maternal grandmother, to whom I shall refer as I.K.; Constable Lorenzo Lance Caesar ("*Constable Ceaser*"), a member of the South African Police Services, stationed at the Mount Road Criminal Record Centre as a forensic fieldworker, and who attended upon the alleged crime scene in order to document it photographically; and Sister Nompelo Vellem, a nursing sister at Dora Nginza, Thuthuzela Care Centre, who conducted a medical examination of the complainant on 5 January 2021. The accused, together with a further three witnesses gave evidence in support of the accused's defence.

[9] Having been satisfied that the complainant had the ability to differentiate between fact and fiction and was competent to give evidence; I explained the importance to him of telling the truth in what he told the court. I was, however, not satisfied that the complainant was able to understand the nature and import of the oath and accordingly he was admonished to tell the truth in terms of section 164(1) of the Criminal Procedure Act, 51 of 1977. The complainant's evidence was thereafter led through an intermediary and the proceedings were conducted *in camera*.

[10] The complainant testified that he would regularly visit the accused's home, which he loved to do. Where reference was made to the accused's home in evidence, it became clear that the complainant was referring to the home of the accused's mother, S.G.M. On the day in question, the complainant visited S.G.M's

home. Shortly after his arrival, S.G.M. allegedly sent him to the shop to purchase a number of goods for her, which he duly did. After delivering the goods to S.G.M, he went to play football with some friends on a nearby school field. When he was finished playing, he returned to his paternal grandmother's home to find that no one was there. He then proceeded back to S.G.M.'s home, where S.G.M. had prepared *vetkoek* for lunch. He testified that the accused fetched *vetkoek* from the main house for his lunch; took the *vetkoek* to his room; and thereafter brought them back to the main house. Why the accused allegedly returned the *vetkoek*, was not explained. The accused allegedly proceeded to leave the house to visit his friends.

[11] At some time prior to dinner, the accused arrived home. He took dinner from the main house to have with his girlfriend, who was in the accused's house at the relevant time. Thereafter, S.G.M. pushed the door to the main house closed, without locking it, and he, S.G.M. and S.G.M.'s boyfriend, went to sleep. S.G.M. and her boyfriend slept in the bedroom of the main house, whilst the complainant slept on the small 2-seater couch in the living room. When retiring to the bedroom, S.G.M. and her boyfriend allegedly closed the bedroom door.

[12] Notwithstanding the complainant's prior evidence that he had gone to sleep, the complainant thereafter testified that some time later, whilst he was watching Popeye on the television, the accused entered the main house and watched television with him. This was but one of the many inconsistencies in the complainant's evidence. He thereafter contends that he fell asleep in the presence of the accused, who then did "*dirty things*" to him. I pause to mention that it was clarified in evidence that where reference was made to "*dirty things*" by the complainant, it meant sexual intercourse by the penetration of the accused's penis into the complainant's anus. The complainant gave a detailed, but somewhat evolving, description of the alleged sexual assault.

[13] He stated that he was lying on his back when the accused approached him and did dirty things to him. He further contended that he was asleep at the time and only awoke whilst the accused was in the process of the commission of the offence. He stated that when the accused was finished, the complainant wanted to continue watching television, but the accused grabbed him and told him to lie on his stomach.

As to where on his body the accused had grabbed him, changed as the evidence proceeded, from around his waist; to on his shoulders; and lastly, to around his neck.

[14] In any event, the complainant testified that he complied with the accused's instructions and lay on his stomach. The accused proceeded to lie on top of the complainant and inserted his penis into the complainant's anus. The complainant described the alleged sexual assault as having carried on for a long period of time, all the while, the accused's mother and her boyfriend were asleep in a room no more than one meter away, in the architectural circumstances, which I have described above.

[15] The complainant alleged that he felt pain in his back and in his anus. When queried as to who had removed his clothing, the complainant testified that the accused had knelt on top of him, whilst he was lying on his stomach, and that the accused had pulled both his own and the complainant's pants and underwear down beneath buttocks level.

[16] At this juncture, I pause to mention that not only is this evidence, in itself contradictory, but it is also improbable. I say this for the following reasons. Had the complainant awoken during the commission of the offence, he would have had no recollection of how or when either his or the accused's clothing had been removed. Moreover, implicit in his evidence that their clothing had been removed whilst he was lying on his stomach, is that the sexual assault had not previously taken place whilst he was lying on his back, as he had testified. In respect of the probabilities, if one has regard to the size of the couch in question and the position of the wooden arms, it would be required of a child with small stature to sleep on his side, in a foetal position. This was conceded by the complainant during cross examination. It is simply not possible that the complainant, let alone an adult man, could lie outstretched on the couch. I also find it highly improbable, that the accused would risk committing such an act no more than one meter away, and in earshot, of his mother and her boyfriend. That a child of such a tender age, having been assaulted in the manner in which he described, would without much ado, seek to continue watching television, is also against the inherent probabilities.

[17] I return to the events as narrated by the complainant.

[18] After the accused was finished sexually assaulting the complainant, and whilst remaining on top of his back, the complainant contends that the accused reached for a roll of Sellotape, which was positioned on a small side table in the corner of the living room and taped the complainant's mouth closed. He later testified that the Sellotape was applied to his mouth *during* the commission of the sexual assault and not at the end. When finished, the accused got up; dressed himself first; and then dressed the complainant.

[19] The accused allegedly carried the complainant outside to his vacant room and proceeded to sexually assault the complainant, first on the accused's bed and thereafter on a couch in the accused's room. The complainant testified that the accused positioned him on his stomach and lay on top of him whilst sexually assaulting him on the couch. It later emerged in the accused's evidence, which evidence was uncontested, that the couch in question was a one-seater couch. In such circumstances, the manner in which the alleged sexual assault had taken place, as testified by the complainant, is highly improbable. When queried as to where the accused's girlfriend was at the relevant time, the complainant testified that he had seen her leave the accused's room whilst he was being carried out of the main house. That the accused would carry the complainant to his room, in which he had previously left his girlfriend, on the off chance that she would leave prior to his return, is also highly improbable.

[20] When he was finished being sexually assaulted, the complainant testified that the accused chased him away, stating that he needed to use the toilet. This evidence thereafter vacillated between different versions. The complainant later testified that as he was being chased away, the accused had threatened to obtain a firearm and shoot him should he tell anyone what had happened. During cross examination, the complainant stated that following the sexual assault on the couch in the accused's room, he had gone to sleep, whereafter he had been chased away by the accused the next morning, in the presence of the accused's mother. In a statement given by the complainant to members of the South African Police

Services, the complainant alleged that he was sexually assaulted in the main house, whereafter he had spent the night in the accused's room, sleeping on the couch.

[21] During examination in chief, no further mention was made by the complainant of the Sellotape, which had allegedly been placed on his mouth. During cross examination, the complainant asserted that the accused had removed the Sellotape from his mouth at some point. When queried as to why he had not screamed for assistance from N.N. and his girlfriend, given that they were in earshot of the complainant and the accused, the complainant contended, for the first time, that they had not slept at home that night, having left earlier that day. Not only was this the first time that this alleged version had emerged in the evidence, but it was contrary to the complainant's prior evidence that the accused and N.N. had been burning rubbish around a fire in the yard on the night in question. When confronted with this inconsistent evidence, the complainant testified that there had been two fires, one during the day with the accused and N.N., and another during the night, with only the accused being present.

[22] During cross examination, it was further put to the complainant that the area in which S.G.M resides is dangerous and for this reason, the door to the main house is kept locked at night. In such circumstances, it would be impossible for the accused to gain access into the main house. The complainant testified that he had only ever seen the door being locked on one occasion. Not only is this highly improbable, but it is contrary to the evidence of S.G.M., who testified that in addition to the door being locked every night, with two internal bolts, making access from outside impossible; a security gate, which is fitted on the outside of the door, is kept locked with a padlock. This evidence was corroborated by the accused as well as the remaining defence witnesses. I return to this aspect later.

[23] During cross-examination, the complainant stated that on leaving the accused's mother's home, he went to play with his siblings, who in turn alerted his grandmother to the fact that he "*was stinking*". It later transpired that the complainant had soiled himself, this being something which the complainant had a history of doing. This fact is common cause. The complainant thereafter had a bath and noticed that there was blood on his anus. When queried as to how he had he

noticed the blood, he stated that he had seen blood on his clothing and that he had witnessed blood dripping from his anus onto the floor. The complainant's grandmother, having seen that the complainant had soiled himself, enquired what had happened to him. The complainant did not answer. It was only when she offered to pay him R100.00 to tell her what had happened that the complainant had, on his own version, spoken out as to the alleged sexual assault. She thereafter examined him; applied cream to his anus; called the police; and took the complainant to Dora Nginza for examination. At one stage the complainant testified that his grandmother had seen blood on his anus, whilst at another stage, he contended that she had seen the blood on his clothing. The extent of the complainant's injury, as testified to by him, is inconsistent with the evidence of his grandmother and that of the nursing sister, to which I return.

[24] I interpose to highlight that the complainant, in: (i) his statement to his grandmother; (ii) his statement to the members of the South African Police Services, to which I have referred; and (iii) his statement to the nursing sister who later examined him, made no mention of the alleged sexual assault, which took place in the accused's house, and only gave a recount of what he contended to have happened in the main house.

[25] On the whole, the complainant's evidence was fraught with inconsistencies and inherent contradictions, which were numerous, and in many respects, material. The evolving nature of the complainant's evidence when he was faced with his own contradictory versions and improbabilities was a pattern which emerged early on during cross-examination. It gave the distinct impression that the complainant was attempting to explain away the apparent contradictions in his evidence in order to marry such evidence with his original narrative. Save as aforesaid, and for the purposes of the present judgment, I do not deem it necessary to traverse and analyse the further contradictions, all of which are apparent from the record.

[26] According to the medical evidence, which was obtained on 5 January 2021, no swelling nor any bruising around the complainant's anus was noted. The complainant did however present with redness around the anus and two small tears, positioned at 11 and 12 o'clock respectively. Based on these observations, the

nursing sister concluded that the injuries seen, were consistent with forced anal penetration and that rape could not be excluded.

[27] The likelihood of the lack of swelling and the absence of bruising, together with the presence of what can be described as minor injuries being noted on examination, within 24 hours of the alleged sexual assault on a seven year old boy by an adult man, which had allegedly been prolonged and had occurred on multiple occasions throughout the night, was not pursued during cross-examination. Presumably, this line of questioning was not pursued, given the material concessions which were made by the nursing sister, to which I now turn.

[28] On her own version, Sister Vellem testified that the redness, apart from forced penetration, could have been caused by itching, friction or infection and that other causes, such as haemorrhoids, could have caused the tears noted. During cross examination, she conceded that the redness could be attributed to diarrhoea and that if the condition was chronic, it could lead to the dryness of skin resulting in cracks and tears. This too could lead to slight bleeding. As the complainant's family had failed to inform Sister Vellem of the complainant's medical history pertaining to him soiling himself, this was not an aspect which had been considered by the nursing sister at the time of her examination. She readily conceded that the injuries observed by her could also have been caused by the medical circumstances referred to. The medical evidence was accordingly neutral and inconclusive.

[29] Constable Caesar testified that on 8 September 2021, he attended upon the alleged crime scene, which was pointed out to him by the complainant and his mother, in order to document it photographically. He thereafter compiled the photograph album, which was tendered into evidence at trial and which consists of photographs of the main house. At no stage was Constable Caesar's attention directed to an alleged sexual assault, which had occurred in the accused's house.

[30] I.K, the complainant's maternal grandmother, testified that the complainant had a long history of soiling himself and that this had resulted in a traditional ceremony being performed by the family to enlist the assistance of their ancestors. Whilst the ceremony had initially appeared to have resulted in the abatement of the

complainant's condition, it had returned some time thereafter. On the morning of 5 January 2021, the complainant arrived home whilst I.K. was cleaning. She was advised by his siblings that the complainant "*was smelling*". She beckoned for the complainant to come inside, at which point she noted that the complainant had soiled himself. With the assistance of one of the older children, a bath was prepared for the complainant. The complainant, after entering the bath, quickly exited the water, complaining that his anus was sore. On examination, I.K. noticed a small scratch, which was bleeding as well as faeces around his anus. She enquired from the complainant what had happened. He did not respond. It was only after she offered to pay him R100.00 for him to speak, that he told her that the accused had "*done dirty things to him*". According to I.K., she thought that offering the complainant money would encourage him to speak as he liked money very much.

[31] I.K. conceded during cross examination that on prior occasions when the complainant had soiled himself, she had not inspected his anus nor had he been taken to be examined by a medical officer. He did not like to speak about his condition. The scratch noted by her, on inspection, was small in size and there was little bleeding around the scratch. She noticed no other blood on the complainant nor on his clothing, which she had personally washed. She did not apply cream to the complainant's anus. As previously alluded to, this is inconsistent with the evidence of the complainant, which I have canvassed above, and which differs from that of his grandmother.

[32] I.K. further conceded under cross-examination that: (i) the complainant was afraid that she would give him a hiding as he was the only child that had "*this problem*", same being reference to him soiling himself; (ii) prior to the complainant telling her of the alleged sexual assault, she had threatened to call the police, of whom he was afraid, if he did not inform her of what had happened; and (iii) that she had thereafter promised to give him R100.00 if he agreed to speak. The complainant thereafter informed her of the alleged sexual assault, which was limited to one incident in the main house.

[33] I interpose, at this stage, to highlight the trite principle that where no voluntary report of rape is made, the court must determine whether the evidence, excluding

the report obtained by coercion, proves the charges of rape against an accused beyond reasonable doubt.¹

[34] Lastly, I.K. testified that the complainant was prone to telling stories and that he had recently alleged that his grandfather had been giving him hidings and had chased him away, which I.K. maintained, was untrue. As this evidence only emerged for the first time during I’K.’s cross examination, it was not canvassed with the complainant.

[35] The state thereafter closed its case.

[36] The accused; his mother, S.G.M; the accused’s housemate, N.N.; and his mother’s boyfriend, to whom I shall refer as M.D., testified in support of the accused’s defence.

[37] The accused testified that on 4 January 2021, he had not attended work as it had rained the previous day. He was involved in the construction trade, laying bricks, and accordingly when it rained, he was unable to work. At the request of his mother, he had spent the day clearing rubbish in the yard and had prepared a fire to burn the rubbish that night. This was the only fire that had been lit on the day in question as he was not permitted to burn fires during the day whilst his neighbours washing was hanging out to dry. He, together with N.N, attended to the fire. Both the accused’s and N.N’s girlfriends were at home on the night in question.

[38] The accused testified that he knew the complainant well and that he would often visit the main house and play in the yard. On 4 January 2021, he saw the complainant at some stage between 19h00 and 20h00, whilst attending to the fire. He had not previously seen him that day. N.N. instructed the complainant to return to the main house, as it was getting late. This is the last time that the accused saw the complainant on 4 January 2021. Thereafter, his girlfriend fetched food and something to drink from the main house. At this stage, the security gate on the door of the main house was already locked, and accordingly the food and drink were

¹ *Vilakazi v S* 2016 (2) SACR 365 (SCA).

passed through the door to the accused's girlfriend by M.D. This was corroborated by both the accused's mother and M.D. Between the hours of 23h00 and 00h00, the fire was put out and he and N.N. retired to their rooms, where they conversed for a short while before going to bed. At no stage did the accused or his girlfriend leave the accused's house after going to bed until the next morning. Similarly, N.N. and his girlfriend, remained home that night. The evidence of N.N. was consistent with that of the accused.

[39] The accused testified that the neighbourhood in which they reside is very dangerous. Some years back, his father, who was still alive at the time, had installed two bolts on the inside of the door of the main house for added security. Without fail, each night, the security gate is locked with the use of a padlock. Similarly, the door to the main house is locked with the two bolts, from the inside, making it impossible for anyone to gain entry into the main house. Not only was this corroborated by the accused's mother and M.D., but they respectively testified that on the night of 4 January 2021, M.D. had personally locked and bolted the door prior to retiring to the bedroom, whereafter the accused's mother had checked to make sure that the door was locked.

[40] The next morning, on 5 January 2021, the accused woke up at approximately 09h00. At that stage, the door to the main house was already open. He entered the main house to make porridge for his girlfriend and saw only his mother. He was informed by his mother that the complainant had left the main house after having broken a mug. The accused returned to his girlfriend who was still in the accused's house. A while later, the complainant and his mother entered the yard making accusations regarding the alleged sexual assault. The accused maintained his innocence throughout. When advised that the police had been called, the accused remained at home and stated that they could find him in the yard, where he waited. He was later arrested. S.G.M testified that she had kept the remains of the broken cup as well as the complainant's t-shirt, which she had helped him remove after he had spilt tea on himself prior to him leaving the main house on 5 January 2021. She denied having sent the complainant to the shops on 4 January 2021 and having seen the accused chasing the complainant out of the main house the next morning.

[41] The accused, when questioned regarding the architectural set-up in the main house, confirmed that the bedroom wall did not act to prevent the passage of sound between the bedroom and the remainder of the house, so much so that you are able to hear people whispering from one room to another. He further stated that the bedroom door was unable to close, given that it was resting on the floor. The accused's mother further explained that the hinges to the door were broken and accordingly it could not close. This too was corroborated by M.D. This factor alone, if viewed in light of the evidence of the complainant renders his version as to the commission of the sexual assault in the main house even more improbable.

[42] At trial, the accused emphatically denied: (i) having entered the main house on the night in question; (ii) having committed the alleged sexual assaults on the complainant; and (iii) having threatened the complainant in any manner.

[43] The accused struck me as honest and credible witnesses, with his evidence according with the inherent probabilities. His answers, both in examination in chief and under cross-examination, were consistent; candid; and spontaneous. The same can be said of the evidence of S.G.M; N.N.; and M.D, whose evidence corroborated that of the accused, in all material respects. I am alive to the minor discrepancies in their evidence, such as N.N.'s version as to why the accused did not attend work on 4 January 2021, but nothing turns on this. This in any event was inconsistent with the evidence of M.D., who worked together with the accused at the relevant time, and whose evidence accorded with that of the accused.

[44] Unsurprisingly, in argument, the state levelled no criticism of any significance against the evidence of the accused or that of his witnesses.

[45] Cases involving the leading of evidence from young witnesses are undoubtably difficult. This is more so in cases concerning alleged sexual offences. This case was no exception.

[46] In *S v Vilakazi*,² Nugent JA observed as follows at paragraph [21]:

² 2009 (1) SACR 552.

“The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone. In those circumstances each detail can be vitally important.”

[47] In *Woji v Santam Insurance Co Ltd*,³ the court found that, just as with the evidence of any witness, a child’s evidence must be assessed with regards to the witness’s evident powers of observation; their capacity of narration; and their trustworthiness. However, it was further pointed out, by the learned judge of appeal, that “[a]t the same time, the danger of believing a child where evidence stands alone, must not be underrated”.

[48] This observation had previously been referred to by Schreiner JA, in *R v Manda*,⁴ in which it was stated that:

“... the dangers inherent in reliance upon the uncorroborated evidence of a young child must not be underrated. The imaginativeness and suggestibility of children are only two of a number of elements that require their evidence to be scrutinised with care amounting, perhaps, to suspicion. ... The trial court must fully appreciate the dangers inherent in the acceptance of such evidence.”

³ 1981 (1) SA 1020 (A).

The court held that:

“Trustworthiness . . . depends on factors such as the child’s power of observation, his power of recollection, and his power of narration on the specific matter to be testified. . . . His capacity of observation will depend on whether he appears “intelligent enough to observe”. Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion “to remember what occurs” while the capacity of narration or communication raises the question whether the child has the “capacity to understand the questions put, and to frame and express intelligent answers.”

⁴ 1951 (3) SA 158 (A).

[49] I am alive to such dangers. I am also acutely aware that inconsistency in the evidence of a complainant is not always sufficient reason to reject his or her evidence, and that such evidence needs to be adjudicated upon having regard to all the evidence before court. The question which remains to be answered, is whether the state has proved the accused's guilt, beyond reasonable doubt.

[50] What was termed 'a compartmentalised approach' to the assessment of evidence, was cautioned against in *Stevens v S*,⁵ such approach being that which separates the evidence before the court into compartments by examining the 'defence case' in isolation from the 'state's case'.

[51] In *S v Van der Meyden*,⁶ and as articulated by Nugent J at 449c-450b:

'Purely as a matter of logic, the prosecution evidence does not need to be rejected in order to conclude that there is a reasonable possibility that the accused might be innocent. But what is required in order to reach that conclusion is at least the equivalent possibility that the incriminating evidence might not be true. Evidence which incriminates the accused, and evidence which exculpates him, cannot both be true – there is not even a possibility that both might be true – the one is possibly true only if there is an equivalent possibility that the other is untrue. There will be cases where the State evidence is so convincing and conclusive as to exclude the reasonable possibility that the accused might be innocent, no matter that his evidence might suggest the contrary when viewed in isolation.'

... The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the

⁵ [2005] 1 All SA 1 (SCA).

⁶ 1999 (1) SACR 447 (W).

evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'

[52] Where the evidence leaves room for reasonable doubt, it does not suffice for the purposes of convicting an accused person that the evidence establishes a case of suspicion, or even a strong suspicion.⁷

[53] On a conspectus of the evidence before court, there exist no inherent probabilities, which favour the state's case. To the contrary, they favour the case of the accused. I have previously dealt with the weight to be attached to the medical evidence, in the circumstances of this case, and the first report, which was not voluntary in nature. For the reasons already stated, the complainant's evidence, which was uncorroborated, was demonstrably unreliable, leaving me with significant doubt.⁸ Moreover, I am of the considered view that the accused's version is reasonably possibly true. There can accordingly be only one result, for our law enjoins the state to prove its case beyond reasonable doubt, which it has failed to do.

[54] In the result, the following order shall issue:

The accused is found not guilty on both charges and is acquitted.

I BANDS

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the State:

Ms Grootboom

⁷ *R v Manda* 1951 (3) SA 158 (A).

⁸ See also *Maila v The State* (429/2022) [2023] ZASCA 3 (23 January 2023) at paragraph 18, in which the court stated: "*This Court has, since Woji, cautioned against what is now commonly known as the double cautionary rule.¹ It has stated that the double cautionary rule should not be used to disadvantage a child witness on that basis alone. The evidence of a child witness must be considered as a whole, taking into account all the evidence. This means that, at the end of the case, the single child witness's evidence, tested through (in most cases, rigorous) cross-examination, should be 'trustworthy'.*"

Instructed by: NDPP

For the Accused: Ms Theron

Instructed by: Legal-Aid, South Africa

Coram: Bands AJ

Dates heard: 25 July 2022 – 28 July 2022;
15 August 2022 – 19 August 2022;
25 August 2022 – 26 August 2022;
6 September 2022;
8 September 2022 – 9 September 2022;
13 September 2022 – 15 September 2022;
20 September 2022;
17 October 2022 – 18 October 2022;
20 October 2022;
24 October 2022 – 25 October 2022;
27 October 2022;
27 February 2023 – 28 February 2023;
1 March 2023 – 3 March 2023;
6 March 2023 – 9 March 2023.

Delivered: 13 March 2023