DIE HOOGSTE HOF VAN APPÈL
VAN SUID-AFRIKA

Rapporteerbaar

SAAK NR: 397/04

In die saak tussen :

JOHAN MARX Appellant

- en -

DIE STAAT Respondent

Coram: **STREICHER, CAMERON & NUGENT ARR**

Verhoor: **9 MEI 2005**

Gelewer: **23 AUGUST 2005**

Opsomming: **Verkragting – onsedelike aanranding – nieteenstaande die verwerping van appellant se getuienis nie bo redelike twyfel bewys dat gemeenskap en betasting sonder klaagster se toestemming plaasgevind het nie – oortreding van art 14(1)(b) van Wet 23 van 1957 – art 3(1)(b) van Wet 45 van 1988 – toestemming tot die toelating van hoorsê-getuienis by wyse van die uitlokking daarvan – erkenning van 'n feit by wyse van die stel daarvan as 'n feit gedurende kruisondervraging.**

U I T S P R A A K

STREICHER AR

STREICHER AR:

[1] Die appellant is in die streekhof te Bellville skuldigbevind aan verkragting en onsedelike aanranding en gevonnis tot 10 jaar gevangenisstraf ten opsigte van die verkragting en twee jaar gevangenisstraf samelopend met die 10 jaar gevangenisstraf, ten opsigte van die onsedelike aanranding. 'n Appèl deur hom na die Hoë Hof te Kaapstad was onsukesesvol en met die verlof van laasgenoemde hof (‘die hof *a quo*’) appèlleer hy nou na hierdie hof.

[2] Die aanklag teen die appellant was dat die onsedelike aanranding plaasgevind het gedurende die tydperk Augustus 1997 tot Oktober 1999 en dat die verkragting plaasgevind het gedurende die periode Maart 1998 tot Oktober 1999. Volgens die klaagster het sy op 9 Oktober 1997 16 jaar oud geword.

[3] Die appellant het onskuldig gepleit op beide aanklagte. In sy pleitverduideliking ingevolge art 115 van die Strafproseswet 55 van 1977 het hy erken dat hy ongeveer gedurende die periode Julie tot Augustus 1999 in die slaapkamer van sy huis aan die klaagster se bobeen en privaatdeel gevat het en dat hy sy vinger in haar vagina gedruk het. Hy het ook erken dat hy op 9 Oktober 1999 te sy huis gemeenskap met die klaagster gehad het. In beide gevalle het dit volgens hom geskied met die toestemming en medewerking van die klaagster.

[4] Die klaagster en die appellant het mekaar in 1997 ontmoet. Op daardie stadium was die klaagster in standard agt op skool. Na die ontmoeting en wel tot Oktober 1999 het die klaagster op 'n gereelde basis die kinders van die appellant by sy huis opgepas en het sy dikwels, veral oor naweke, daar oorgebly.

[5] Volgens die klaagster was die appellant 'n vriend van haar pa en het sy hom ontmoet toe hy op 'n geleentheid by hulle aan huis kom rugby kyk het. Die appellant het toe gevra of sy nie sou belangstel om sy kinders van tyd tot tyd op te pas nie. Sy het ingestem om dit te doen. Sy het getuig dat die ontmoeting plaasgevind het in Junie 1997. In 'n verklaring wat sy op 23 Oktober 2000 aan die polisie gemaak het, het sy gesê dat die ontmoeting in Augustuts 1997 plaasgevind het. Sy het getuig dat die appellant gedurende die September vakansie aan haar begin vat het en ‘goeters’ begin sê het wat haar ongemaklik laat voel het. Hy het onder andere aan haar dinge gesê soos: ‘My vrou gaan nou-nou winkel toe, dan is ek en jy alleen’; en ‘Daar gaan 'n man kom wat jou kan sag maak.’

[6] Die vattery van die appellant het aldus die klaagster al verder en verder gegaan. Mettertyd het hy onder andere aan haar bors gevat. Sy het dan sy hand weggeklap en gesê sy hou nie daarvan nie. Hy het dan sy hand weggevat en later dit weer gedoen. Soms het hy haar daarna vir 'n tydlank geïgnoreer en gesê sy is lelik met hom. Op 'n Saterdagaand, ongeveer drie maande na hulle ontmoeting en steeds gedurende die September vakansie, toe die klaagster weer by die appellant se huis oorgeslaap het, het die appellant se eggenote, mev Marx, haar gevra om saam televisie te kyk. Die televisiestel was in die appellant se

slaapkamer. Die klaagster en mev Marx het saam op die bed gelê. Die klaagster het reeds haar slaapklere aangehad. Die appellant het die kamer binnegekom en tussen hulle gaan sit. Later het hy vir mev Marx gevra om te gaan stort en haar lekker aan te trek. Almal het op daardie stadium onder 'n kombers gelê. Die gebeure wat daarop gevolg het, terwyl mev Marx gebad het, is aanvanklik so deur die klaagster beskryf:

'En hy druk toe sy . . . sy hand by my broek in. En ek sê vir hom, nee. En ek probeer sy hand so trek. En hy druk sy hand so teen my vas en hy sê, "Wag nou. Wag net gou." Ek sê vir hom, nee. En hoe meer ek vir hom nee sê, sê hy vir my, "Wag net gou". Hy was dronk, in elk geval dronk. En toe kom hy nader en hy druk sy vinger in my geslagsdeel. En hoe meer ek vir hom sê, moenie, hoe dieper druk hy dit in. En toe sy vrou kom, toe trek hy dit skielik . . . toe hy nou hoor sy gaan nou uit die badkamer uit kom, toe trek hy sy vinger uit.'

Sy het later bygevoeg:

'Ek het sy hand probeer uittrek. Hy wou nie sy hand los nie. Ek kon nie opspring nie, want hy bly my terugdruk.

. . .

Ek het probeer opstaan en probeer om sy hand weg te kry, maar ek kon nie, want hy is baie sterker as ek.

. . .

Hy het net gesê ek moet sjuut, ek moet sagter, sy vrou is daar.

. . .

Dit is aaklig, hy het dit net gedoen. En hoe verder hy gaan, hoe meer ek sy hand vasdruk om dit nie te doen nie, maar hy het nie gehoor nie, hy het dit nou maar net gedoen.'

[7] Die klaagster het ook haar aksies beskryf as: 'Gekeer en gedruk om hom uit te haal.' Op die vraag hoe die appellant dit reggekry het om sy vinger in haar

privaatdeel te druk as sy onwillig was, het die klaagster vroeër geantwoord: ‘Ja, ek het gesit, ek het toegeknyp en ek het my hand gevat en ek het sy hand probeer uittrek. Ek het TV gekyk, dit was onverwags, dit is nie asof ek gesit en wag het dat hy sy hand in my broek gaan druk nie. Want ek het nie verwag dat so iets met my gaan gebeur nie. . . . hy was by die helfte van my geslagsdeel, toe is sy hand al . . . toe kom ek dit agter.’ Kort na hierdie getuienis het sy egter toegegee dat sy nie haar bene toegeknyp het nie en het sy gesê dat sy nie weet hoekom sy dit nie gedoen het nie. Sy het wel sy hand vasgedruk ‘sodat (sy) dit kan stop, sodat hy dit kan uittrek’. Later het sy getuig dat sy met albei hande probeer het om sy hand uit te trek. Sy het, in stryd met haar vroeëre getuienis dat sy probeer het om op te staan, getuig dat sy nie probeer het om op te staan nie en dat sy nie hard gepraat het uit vrees dat mev Marx sou hoor. Op die vraag hoekom sy nie geloop het toe mev Marx teruggekeer het nie was haar antwoord:

> ‘Sy het my gevra om te bly om die video te kyk. Ek het gebly . . . ek wou so veel as moontlik by haar gewees het. Sy was vir my, soos ek al tienduisend keer gesê het, soos 'n vriendin. Ek sou . . . daar was 'n stadium wat ek by haar wou bly, omdat ek die aandag gekry het wat ek nie by my ouerhuis gekry het nie. . . . ek wou haar nie verloor nie, ek wil nie hê sy moet weet nie.’

[8] Toe mev Marx terugkom het die appellant volgens die klaagster sy hand vinnig uitgepluk. Mev Marx het langs hom gaan sit en hy het gemaak asof niks gebeur het nie. Mev Marx het aan die slaap geraak en die klaagster het moeg geraak, waarop sy na haar kamer gegaan het en gaan slaap het.

[9] Dit is ten opsigte van hierdie voorval (‘hierna genoem die betastingsvoorval’) dat die streekhof die appellant skuldig bevind het op die klag van onsedelike aanranding.

[10] Na die betastingsvoorval het die klaagster nog gereeld na die appellant se huis gegaan. Sy het ook dikwels weer saam met die appellant en sy vrou video gekyk in hulle slaapkamer. Die volgende het dan gebeur terwyl hulle regop in die bed gesit het met 'n duvet oor hulle:

‘. . . dan sal hy sy hand so om sit en met sy hande afvroetel en my knope losmaak en aan my borste vat. En dan kan ek nie boe of ba nie, want sy vrou sit langs my. En wat sê ek vir haar as ek rondbeweeg en my hemp hang oop en wat nou. Hy het altyd vir my in 'n posisie . . . situasie gesit waar ek nie regtig kon uitkom nie.

. . .

En later het hy ook sy een been oor my been gegooi, so teen my geskuur met sy been. Of hy het sy voet gevat en so op en af teen my geskuur. Hy het baie keer ook my hand gevat en dit dan op sy geslagsorgaan gesit. En ek het dit altyd weggeruk, want ek wil nie my hand daar naby hê nie.’

[11] Kort na die betastingsvoorval, op die klaagster se 16de verjaarsdag, het sy na die appellant, wat op dieselfde dag verjaar het, gegaan om hom geluk te wens met sy verjaarsdag en aan hom 'n kaartjie te oorhandig. Mev Marx was nie tuis nie. Volgens die klaagster het die appellant haar meer as 'n normale soen gegee en aan haar borste gevat. Sy het nie getuig dat sy op hierdie geleentheid haar enigsins teëgesit het of dat dit haar nie geval het nie.

[12] Die klaagster het getuig dat sy weer en weer teruggegaan het omrede sy lief was vir mev Marx en die kinders en sy skuldig gevoel het om nie aan 'n

versoek van mev Marx te voldoen nie. Alhoewel sy telkens na 'n video episode in haar kamer gelê en huil het, het sy telkens weer saam met die appellant en sy vrou in hulle slaapkamer gaan video kyk ook omdat sy by sy vrou wou wees. Sy het dan die appellant se vattery sonder teëstribbeling verduur omrede soos sy dit gestel het:

> 'Ek wou nie hê sy moet weet dat hy dit doen nie, want ek wou hulle nie opbreek nie. Ek wil nie die kinders seermaak om te weet, my ma en pa sal miskien uitmekaar uit gaan, omdat hy vroetel aan 'n jonger meisie nie. En omdat sy vrou, sy sou nie so iets kon verwag nie. Dit sou vir haar breek. Sy het hel onder Johan Marx, en om dit . . . dit sal haar breek. En ek sal nie . . . ek wou haar nie so seermaak nie.'

Alhoewel sy by geleentheid opgestaan het of 'n versoek om saam na 'n video te kyk van die hand gewys het, het sy nie daarmee volhard nie omrede mev Marx dan vrae begin vra het en sy wou verhinder dat sy uitvind en sodoende seergemaak word.

[13] Die klaagster het dus eerder die risiko geloop dat mev Marx agterkom wat langs haar in die bed aangaan tussen 'n meisie in haar slaapklere en haar man as om haar agterdogtig te maak deur te weier om in die bed langs haar man te lê.

[14] Voor die Desember 1997 vakansie het die klaagster, steeds volgens haar getuienis, weer na die appellant se huis gegaan om geskenke wat sy vir mev Marx en die kinders gekoop het te oorhandig. Die appellant was besig om te stort en het gesê sy moes 'n rukkie wag, mev Marx sou binnekort tuis wees. Terwyl sy in die studeerkamer gesit en wag het, het die appellant ingekom. Sy het die daaropvolgende gebeure soos volg besryf:

'Toe ek sien, toe kom hy net in 'n onderbroek daar in en hy wil hê ek moet aan sy geslagsdeel vat. En hy druk my teen die muur vas en skuur op en af teen my. Daar was so'n glasdeur gewees. En hy het my so teen die hoek gedruk. En toe sê hy nog vir my, ja, kan hy nie net puntjie natmaak nie. Dit was sy presiese woorde. Toe sê ek vir hom, "Nee, waarvan praat jy?". Toe sê hy, "Ag, man, net puntjie natmaak, net vinnig gou puntjie natmaak". Toe sê ek vir hom, nee. En toe het hy my so in my nek gesoen en sy geslagsorgaan teen my geskuur. En toe kom sy vrou en toe hardloop hy vinnig af kamer toe. En ek het daar gestaan en toe gaan ek weer in studeerkamer toe en toe sit ek daar binne. En toe kom hy in en soos altyd maak hy asof hy niks verkeerd gedoen het nie.'

[15] Na die Desember vakansie het die Marx-gesin na 'n ander huis getrek. Die klaagster het dikwels na hulle huis gegaan om hulle te help met die trekkery.

[16] Die appellant en die klaagster het op 31 Maart 1998 die eerste keer met mekaar gemeenskap gehad. Voor dit, gedurende die periode Januarie tot Maart 1998, het dit egter dikwels gebeur dat die appellant agter die klaagster kom staan het en bewegings teen haar gemaak het. Hy het dan ook op sulke geleenthede in haar oor gefluister: 'Ek is nou lus vir 'n lekker steek.' Behalwe soos voormeld kon sy nie spesifieke gevalle noem nie. Sy het wel genoem dat die appellant ook aan haar borste en haar privaatdeel gevat het. Soos reeds vermeld is dit gedurende hierdie tyd wat dit ook 'oor en oor' gebeur het dat die klaagster saam met die appellant en sy vrou na 'n video gekyk het in hulle slaapkamer en die klaagster deur die appellant betas is.

[17] Op 31 Maart 1998 was die klaagster en die appellant weer alleen by die huis. Die klaagster was besig om werkies vir mev Marx in die motorhuis te doen toe die appellant ingekom het en vir haar gesê het: 'Ek wil jou steek.' Volgens

haar het hy aangehou en aangehou en het sy geantwoord: ‘Nee, ek wil nie. Ek het dit nog nooit gedoen nie.’ Later het hy haar geroep: “Kom kyk gou hier.” Sy beskryf die gebeure wat daarop gevolg het soos volg:

‘Toe dog ek, ek moet vir hom iets doen. Toe stap . . . toe sê ek vir hom ek is besig. Toe sê hy, “Kom kyk net gou hier”. En toe ek loop, toe ek in die kamer kom, toe is sy broek afgetrek. Hy is besig om sy orgaan styf te maak, wat jy dit ookal noem. En hy het 'n kondoom opgesit. En ek het . . . wou omdraai en hy gryp my arm, hy sê vir my, “Nee, wag net gou”. Toe het hy vir my neergelê op die grond. En ek het vir hom gesê, “Nee, ek wil nie”. En hy het vir my gesê, dit sal nie seer wees nie, dit sal vinnig oor wees. En hy het dit gedoen. En hoe meer hy dit doen, toe sê ek vir hom, “Moenie, dit is seer, ek wil nie”. En hy het dit gedoen.’

[18] Uit die klaagster se verdere getuienis blyk dit dat die kamer waarna sy verwys die aantrekkamer is, wat grens aan die slaapkamer. Tussen die slaapkamer en die aantrekkamer is daar deure soortgelyk aan kasdeure. Tussen die aantrekkamer en die badkamer is daar nie deure nie. Die klaagster het die deure oopgestoot en die aantrekkamer binnegegaan. Sy het gemeen die appellant wil dalk hê dat sy hom help soek na iets. Die appellant was op daardie stadium in die badkamer. Sy het onmiddellik besef dat hy besig was om 'n kondoom aan te sit en dat hy met haar gemeenskap wou hê. Sy was geskok maar nie so geskok dat sy nie kon omdraai en weghardloop nie. Sy wou omdraai en wegstap maar toe sê die appellant vir haar woorde met die strekking dat sy nie moes bang wees nie en dat sy moes wag. Hy het haar ook aan die arm gevat maar sy meen nie dat hy dit gedoen het om haar te verhinder om weg te hardloop nie. Sy was onkundig en hy wou haar leer ‘al die dinge van seks’. Later het sy getuig dat hy haar wel aan die hand gevat het om te verhinder dat sy uit die kamer kon

wegkom. Sy het ook tot haar vroeëre beskrywing van die gebeure bygevoeg dat sy probeer keer het dat die appellant haar broek losmaak. Terwyl hulle nog gestaan het, het sy probeer verhinder dat die appellant haar broek se knoop losmaak. Die appellant was egter baie sterk en het die knoop losgekry. Sy het haar broek vasgegryp om te verhinder dat hy dit aftrek. Die appellant het haar toe op die grond neergesit want op die grond het hy haar in sy beheer gehad. Sy het eers gesê dat sy nie fisies probeer het om weg te kom nie maar net daarna het sy getuig dat sy wel probeer het maar dat sy nie kon nie. Die appellant het haar neergedruk sodat sy nie kon opstaan nie. Dit was vir haar onmoontlik om uit sy kloue te kom. Hy het haar bene oopgetrek en alhoewel sy probeer het om haar onderklere op te hou het die appellant dit afgeforseer. Gedurende die proses het sy herhaaldelik gesê dat sy nie met die appellant wou gemeenskap hê nie, dat sy bang is en dat sy dit nog nooit gedoen het nie.

[19] Na die gebeure het die klaagster volgens haar getuienis op die kamerbed gaan sit. Die appellant het langs haar kom sit en aan haar die kondoom gewys wat hy toe ook toegeknoop het. Later het sy gesien dat sy bloei. Sy het die appellant daarvan vertel en gesê dat sy bang was iets het verkeerd gegaan.

[20] Aldus die klaagster het sy na die voorval die Marxse vir 'n tydlank vermy. Sy het egter later teruggekeer en van toe af tot 9 Oktober 1999 het sy en die appellant ongeveer 13 keer gemeenskap gehad. Ongeveer 'n verdere ses keer daarna het sy ‘nee’ gesê. Sy kon nie besonderhede gee van wanneer en hoe dit gebeur het nie behalwe om te sê dat dit op die slaapkamerbed of die rusbank plaasgevind het. Daarna het sy nie meer omgegee nie en nie meer teëgestribbel

nie. Die laaste keer wat hulle gemeenskap gehad het was op 9 Oktober 1999 toe sy juweliersware wat sy van mev Marx geleen het vir haar matriekafskeid teruggeneem het en mev Marx haar alleen agtergelaat het met die appellant om na Paarl te gaan. Sy het so na die appellant se huis teruggekeer ten spyte daarvan dat haar pa haar op 'n stadium verbied het om te gaan en sy en haar pa, wat gereken het die appellant ‘het attensies’ baie gestry het in hierdie verband.

[21] Volgens die appellant het die klaagster in Augustus 1997 die eerste keer by sy huis kom kinders oppas. Daarna het sy dit gereeld gedoen. In die meeste gevalle het sy oorgeslaap. Sy het ook op 'n gereelde basis oor naweke by sy huis oorgeslaap. Op sulke geleenthede het hy, sy vrou en die klaagster, vanaf laat 1997, gereeld saam televisie gekyk. Die klaagster het dan op die regteronderpunt van die bed gesit of soms bo aan die linkerkant langs hom. Hy is die een wat vir haar gesê het om daar te kom lê. Dit het gebeur dat hy, sy vrou en die klaagster onder dieselfde duvet of kombers gelê het. Voor ongeveer Julie 1999 het hy glad nie die klaagster betas nie.

[22] Gedurende ongeveer Julie 1999 het hy en die klaagster televisie in die slaapkamer gekyk. Hy het gelê en die klaagster het op die punt van die bed gesit. Sy vrou was in die stort. Hy het die klaagster in die ribbes gepomp en gesê sy moet hom 'n drukkie gee. Sy het dit gedoen. Sy vrou het uit die stort gekom en met haar kop op sy bors gaan lê. Beide het onder 'n duvet gelê. Die appellant het vir die klaagster gesê dat sy langs hom kon kom lê. Hy het dit gedoen omdat die klaagster rondbeweeg het en 'n stoornis veroorsaak het. Dit het gelyk of sy koud kry. Die klaagster het langs hom kom lê en haar toegemaak met die duvet. Haar

been het aan sy been geraak. Sy vrou het gesê sy gaan slaap en het haar rug na hulle kant gedraai. Die appellant het die klaagster se binneboud gevryf. Sy het haar been oor syne getel en hy het bo-oor haar klere aan haar geslagsdeel gevat. Daarna het hy vir haar beduie om haar broek af te trek en nadat sy die rek van haar pajama broek gelig het, het hy dit ook onder die klere gedoen. Die klaagster het sy hand vasgedruk. Sy het haar heupe begin beweeg, hy het benoud geraak dat sy vrou wakker kon word, het sy hand uitgehaal en gesê hy gaan slaap. Na dit, terwyl die klaagster op die kant van die bed gesit het, het hy nog haar hand op sy geslagsdeel gesit en het sy dit 'n druk gegee voordat sy daar uit is en gaan slaap het.

[23] Alhoewel die klaagster die appellant se huis nog net so gereeld soos vantevore besoek het en daar weer gevalle kon gewees het wat die appellant saam met die klaagster televisie gekyk het, het daar tussen hierdie gebeurtenis en 9 Oktober 1999 niks van 'n onbetaamlike aard tussen hom en die klaagster gebeur nie. Hy het nie eers daaraan gedink om weer die klaagster te betas nie. Dit het geensins 'n verandering in die verhouding met die klaagster teweeggebring nie. Op 9 Oktober 1999, die verjaarsdag van beide hom en die klaagster, was hy besig om homself af te droog nadat hy gestort het toe die klaagster die aantrekkamer binngekom het. Hy het haar gevra om hom 'n kansie te gee om homself aan te trek. Sy het vir hom in die slaapkamer gewag. Hy wou haar 'n gewone soen gee om haar met haar verjaarsdag geluk te wens. Sy het hom egter 'n passievolle soen gegee wat op gemeenskap met haar volle medewerking uitgeloop het. Hy was baie senuweeagtig dat sy vrou sou

terugkeer van waar sy ookal was en het vir die klaagster gesê dat hulle gou hulle klere moet aantrek. Hulle het dit gedoen en in die sitkamer gaan sit. Op daardie stadium het hy nog steeds die kondoom wat hy gebruik het aangehad. Nadat sy vrou teruggekom het, is hy terug badkamer toe. Hy het die kondoom afgehaal, dit in 'n papiersak toegedraai en in sy broeksak gesteek. Later het hy gery en dit in die veld gaan weggooi.

[24] Die klaagster het 'n geskiedenis van sielkundige probleme. Sy het moeilike kinderjare gehad. Haar natuurlike ma en pa het nie getrou nie. Toe sy agt jaar oud was en haar ma en haar stiefpa (na wie ek, soos sy, verwys as haar pa) die tweede keer geskei het, kon sy dit nie hanteer nie en het sy sielkundige behandeling ontvang. Sy kon nie die name van al die siekundiges by wie sy was, onthou nie. Gedurende die tydperk 1997 tot 1998 het haar pa finansiële probleme gehad en ‘alles’ insluitende sy huis en voertuie verloor as gevolg waarvan sy depressief was en nie skooltoe gegaan het nie want sy ‘kon nie sien . . . dat (haar) pa al sy goed verloor nie’. Gedurende die periode 1998 tot 1999 was daar weer sprake dat haar ouers gaan skei. Sy het dit as baie ontwrigtend ervaar. Dan het sy volgens haar ook nog die genoemde probleme met die appellant gehad. Sy het selfs probeer om haar eie lewe te neem deur pille te drink. Die appellant was volgens haar die groot rede daarvoor. In November 1999 is 'n ernstige depressiewe episode en angsaanvalle gediagnoseer. Die diagnose van 'n sielkundige was dat die siektetoestand veroorsaak is deur eksamenspanning en onverwerkte kinderjare ervaringe. Sy is op medikasie geplaas wat verligting van die simptome gegee het.

[25] Na die matriekeksamen, in November 1999, het die klaagster vir haar tante in Pletttenbergbaai gaan kuier. Alhoewel sy sedert 1997 'n voorbehoedmiddel as medikasie vir 'n velkwaal gebruik het, het sy vermoed dat sy swanger was omrede die appellant, volgens haar, op die laaste geleentheid wat hulle gemeenskap gehad het nie 'n kondoom gebruik het nie. Sy sê dat sy besig was om van haar kop af te gaan vanweë spanning teweeggebring deur haar vrees dat sy swanger was. In hierdie toestand het sy haar tante in haar vertroue geneem en haar vertel dat sy 'n verhouding met 'n getroude man het. 'n Swangerskap toets het getoon dat sy nie swanger was nie. Volgens die klaagster het sy die gebeure tussen haar en die appellant soos volg aan haar tante beskryf:

'Toe vra sy vir my hoe het dit gebeur. Toe vertel ek hy het eers begin vatterig raak en later het hy my gedwing om met hom seksuele omgang te hê sonder dat ek vir hom ja gesê het.

Later het hy vir u gedwing, is dit wat u gesê het? - - - Hy het . . .

Het u gesê later het hy vir u gedwing om met hom seksuele omgang te hê? - - - Wel, as hy homself op my opgedring, dan dink ek dit is dwing.

Nee, nee, ek vra nie u afleidings nie,ek vra, het u vir die vrou gesê, "Later het hy my gedwing", het u die woord gebruik? - - - Nee, ek dink nie ek het die woord "dwing" gebruik nie.

Goed, mevrou. U het nou vir u tannie gesê hy het aan u gevat en later het hy met u gemeenskap gehad. Verstaan ek dit nou reg, is dit nou om dit in 'n neutedop op te som? - - - Ja.

En u het vir u tannie laat verstaan die gemeenskap was sonder u toestemming, as ek dit so kan stel? - - -Ja

En het u vir u tannie vertel wanneer die dinge sou gebeur het? - - - Ja, ek het haar alles vertel.

. . .

So, u het vir u tannie vertel vandat u in standerd 8 was, sê u, het hy u gemolesteer, om die woord te gebruik en later met u gemeenskap gehad? - - - Ja.'

[26] Nadat die klaagster haar tante vertel het wat gebeur het, het haar tante, volgens haar, gesê dat sy seksueel gemolesteer is en dat aangesien sy die eerste keer wat sy met die appellant gemeenskap gehad het nee gesê het, sy deur hom verkrag is.

[27] Die klaagster se getuienis strook nie met dié van haar tante nie. Ten spyte daarvan dat haar tante verskeie kere gevra is wat die klaagster haar vertel het, het sy nooit getuig dat die klaagster haar vertel het dat sy die eerste keer nie toestemming gegee het nie. Sy het ook nie getuig dat sy die klaagster geadviseer het dat sy verkrag is nie, maar het getuig: 'Ek het vir Marlese vertel wat gebeur het is verkeerd, want sy was minderjarig en dit was 'n volwasse persoon. En ek het gevoel dat sy moes haar ouers onmiddellik daarvan sê wat vir Marlese verskriklik was.'

[28] Gedurende Desember 1999 terwyl die klaagster in Knysna by haar tante gekuier het, het sy volgens haar getuienis vir mev Marx geskakel om haar mee te deel dat sy haar eksamen geslaag het. Die appelant en sy gesin was op daardie stadium ook in Knysna en op uitnodiging van mev Marx het sy hulle gaan groet by 'n eetplek in die dorp.

[29] Op 2 Februarie 2000 het die klaagster weer ernstige paniekaanvalle begin beleef. Die sielkundige wat sy reeds in November 1999 gespreek het, was steeds van mening dat haar simptome deur studiedruk en onverwerkte kinderjare

ervaringe veroorsaak is. Hy het haar na 'n psigiater verwys wat haar behandel het gedurende die tydperk 20 Maart 2000 tot 29 Mei 2000. Sy het nie vir die sielkundige of die psigiater in haar vertroue geneem oor die ‘molestasie of verkragting’ nie. In antwoord op die vraag hoekom sy hulle nie daarvan vertel het nie het die klaagster geantwoord:

‘Vir my was dit 'n verhouding. Ek het nie geweet wat verkragting of molestering is, wat dit behels, hoe ver jy mag en nie mag gaan voordat dit molestering is nie.’

[30] Kort na hierdie getuienis het sy met betrekking tot haar kennis voordat sy met haar tante gepraat het, getuig:

‘Ek het geweet dit is verkragting en molestering, maar omdat ek later nie meer kon nee sê nie, het ek gedink ek het . . . ek het skuld daaraan. Dit is ek. Ek het geweet dit is verkragting en molestering, maar omdat dit later só was dat ek nie meer vir Johan Marx ja of nee of los my uit kan sê nie, want hy het net geboef-baf, as hy wou dan wou hy. En dit het my skuldig laat voel en laat voel, bly eerder stil Marlese, los dit eerder.’

Op 'n latere stadium en op die vraag of sy nie besef het dat seks sonder toestemming verkragting is nie het sy geantwoord dat sy nie so daaraan gedink het nie. Nog later het sy getuig:

'[I]n u eie gemoed, was daar enige twyfel by u dat wat met u gebeur, verkragting is? - - - Ek het nie aan verkragting gedink nie, nee.

U het nie aan verkragting gedink nie? - - - Nee, omdat . . . omdat hy dit hoeveel keer met my gedoen het en vir my gesê het dit is reg. Ek sê ja, en niemand gaan my glo nie, ek is 'n kind, hy is 'n man en hy het mag. . .

Die vraag is, mevrou, in u gemoed . . .(tussenbeide) - - - Nee.

Daardie tyd het u nooit gedink wat nou hier met my gebeur, is verkragting nie? - - - Nee maar ek het net geweet dit is verkeerd. Dit is nie reg nie.

Het u nie by die skool gehoor van verkragting nie? - - - Ja.

U het by die skool seker gehoor van Child Line wat u kan bel? - - - Ja.

Ja. En Rape Crisis, u het seker daarvan gehoor? - - - Ja.

En u word hier klaarblyklik op u weergawe by herhaling verkrag. Is dit nie so nie? - - - Ja.

U dink nie daaraan dat dit verkragting is nie? Is dit wat u sê U moet tog maar antwoord, asseblief. - - - Nee.

U dink nie daaraan dat dit verkragting is nie? - - - Wel, die eerste keer het ek daaraan gedink, ja, maar ander kere, nee.'

My interpretasie van hierdie getuienis is dat sy nooit aan die gebeure gedink het as verkragting nie en dat bloot omrede sy so in 'n hoek gedryf is deur die waarskynlikheid dat indien die eerste gemeenskap plaasgevind het op die wyse deur haar beweer sy wel daaraan as verkragting sou gedink het, sy op die ou einde gesê het dat sy wel aan die eerste gemeenskap met die appellant as verkragting gedink het.

[31] In Februarie 2000 het die klaagster 'n man, Mornè Stander, aan wie sy in Julie 2000 verloof geraak het en met wie sy later getrou het, ontmoet. 'n Paar maande na hulle ontmoeting het sy, aldus haar getuienis, vir hom vertel van wat tussen haar en die appellant gebeur het. Een aand is sy en Mornè na die appellant se huis en het sy vir die appellant gesê 'Mornè weet en Mornè gaan sorg dat ek die waarheid uitbring'.

[32] Gedurende 13 September en 30 Oktober 2000 het die klaagster behandeling van 'n psigiater en 'n kliniese sielkundige ontvang. Sy het getuig dat sy beide van hulle volledig ingelig het oor die gebeure tussen haar en die appellant. Nadat sy die psigiater, dr Van Rooy so ingelig het, het hy aldus die

klaagster, vir haar gesê dat sy nie 'n verhouding met die appellant gehad het nie, dat sy deur hom gemolesteer is en dat as sy nee gesê het vir seksuele omgang met hom, sy deur hom verkrag is. Sy het getuig dat sy soos volg hierop gereageer het:

'Toe sê ek vir hom, maar dit kan nie wees nie, Johan Marx het gesê dit is 'n verhouding. Toe sê hy, nee, dit is nie 'n verhouding nie, ek was minderjarig en ek het hom nie toestemming gegee om dit aan my te doen nie. . . . Daarna het ek dit vir Morné wat op daardie stadium my verloofde was, gesê wat die dokter gesê het. En hy het my oorreed om my ouers te bel.'

[33] Dr van Rooy se getuienis is nie tot die effek dat die klaagster hom vertel het dat die appellant haar sonder toestemming betas het en sonder haar toestemming met haar gemeenskap gehad het nie. Uit sy getuienis blyk dit dat hy van die klaagster verstaan het dat betasting en penetrasie voor die ouderdom van 16 jaar plaasgevind het en dat hy die klaagster ingelig het dat die appellant hom skuldig gemaak het aan statutêre verkragting.[1] Hy het verder getuig dat hy panieksteuring van 'n redelike ernstige graad gediagnoseer het. Volgens hom is daar 'n direkte verband tussen ontwikkeling van post traumatiese stres tipe simptome en die ontwikkeling van angstoestande en depressie toestande laat in die lewe van kinders wat seksueel gemolesteer is. Die simptome kan egter ook verskeie ander oorsake hê en as die klaagster 'n vrywillige party tot die seksuele toenadering was, kon sy nog steeds tot dieselfde mate dieselfde simptome ontwikkel het.

[1] Sien para [69] waar die statutêre bepaling aangehaal word.

[34] Die klaagster se angsaanvalle het erg geraak en sy het volgens haar getuienis besef dat sy 'n klag teen die appellant moes lê ten einde 'n einde daaraan te maak. Op 23 Oktober 2000 het sy dit gedoen en ook 'n verklaring aan die polisie gemaak.

[35] In haar getuienis het die klaagster verduidelik dat sy nie haar ouers vroeër van die gebeure ingelig het nie omrede sy hulle nie wou seermaak nie. Haar pa het baie vertroue in haar gehad en sy was bang dat hy sy vertroue in haar sou verloor. Sy het ook getuig dat sy bang was dat haar pa haar nie sou glo nie. Laasgenoemde getuienis is oënskynlik in stryd met haar getuienis dat haar pa haar verbied het om na die appellant se huis te gaan, dat hy gesê het dat hy weet die appellant het ‘attensies’ en dat sy baie met haar pa argumente daaroor gehad het. 'n Moontlike verduideliking is egter dat die rede waarom sy nie haar ouers voorheen vertel het nie van tyd tot tyd verander het.

[36] Volgens die klaagster was sy baie lief vir mev Marx en haar kinders en wou sy haar nie as 'n vriendin verloor nie. Sy wou ook nie moeilikheid in die huwelik veroorsaak nie. Vir dié rede en ook omdat sy bang was dat mev Marx haar nie sou glo en haar man se part sou kies, het sy haar nie vertel wat die appellant aan haar gedoen het nie en het sy steeds uitnodigings na die Marx-gesin se huis aanvaar.

[37] Die verhoorlanddros het bevind dat die betastingsvoorval en die gemeenskap op 31 Maart 1998 sonder die toestemming van die klaagster plaasgevind het. Hy het die appellant gevolglik skuldig bevind op albei aanklagte. Alhoewel die appellant na sy mening sy getuienis op 'n bevredigende

wyse afgelê het, en sy getuienis na sy mening oortuigend was, het die verhoorlanddros bevind dat sy weergawe onwaarskynlik is. Daarteenoor het die verhoorlanddros bevind dat die klaagster met die uitsondering van sekere negatiewe aspekte 'n briljante getuie was en dat haar getuienis te gedetailleerd was om gefabriseerd te wees. Sy benadering was om die weergawes van die appellant en die klaagster teen mekaar op te weeg naamlik, aan die een kant die klaagster se weergawe dat die appellant haar sedert 1997 herhaaldelik betas het en dat hy sedert Maart 1998 herhaaldelik met haar gemeenskap gehad het, teenoor die appellant se weergawe dat hy die klaagster met haar toestemming slegs op een geleentheid betas het naamlik in Julie 1999 en dat hy slegs een keer met haar gemeenskap gehad het naamlik op 9 Oktober 1999. In die lig van die waarskynlikhede en sy oordeel oor die geloofwaardigheid van die klaagster het die verhoorlanddros tot die gevolgtrekking gekom dat die appellant se weergawe nie redelik moontlik waar kan wees nie.

[38] Op appèl na die hof *a quo* is die verhoorlanddros se beslissing gehandhaaf. Die hof *a quo* het verwys na die uitspraak in *R v Dhlumayo* 1948 (2) SA 677 (A) waar op 706 gesê is dat as die verhoorregter geen feitelike mistasting begaan het nie is daar 'n vermoede dat sy gevolgtrekking korrek is en dat 'n hof van appèl slegs daarmee sal inmeng as hy oortuig is die bevinding is verkeerd. Verder dat 'n hof van appèl nie angstig sal poog om redes te vind om met die verhoorregter se bevindings in te meng nie aangesien geen uitspraak allesomvattend kan wees en dit nie volg uit die feit dat iets nie genoem word dat dit nie in ag geneem is nie. Na oorweging het die hof *a quo* tot die

gevolgtrekking gekom dat die skuldigbevinding van die appellant op die getuienis geregverdig is, en dat daar geen rede bestaan waarom daar van die verhoorlanddros se bevindings afgewyk of daarmee ingemeng moet word nie.

[39] Ten aansien van die vraag of 'n feitelike mistasting begaan is het Davis Wnd AR in *Dhlumayo* op 706 gesê:

‘10 There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.

11 The appellate court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter.’

Die voorskrifte vervat in *Dhlumayo* is nie regsreëls nie maar slegs logiese riglyne (sien *Dhlumayo* op 695).

[40] Dit is natuurlik so dat 'n hof van appèl slegs met die feitebevindings van 'n verhoorhof sal inmeng as dit van mening is dat die verhoorhof fouteer het. Dit moet egter steeds in gedagte gehou word dat 'n veroordeelde persoon 'n reg van appèl het ook ten opsigte van feitebevindings. Dit is dus die plig van 'n hof van appèl om deeglik die feitebevindings van die verhoorhof te oorweeg en homself te vergewis dat daardie feitebevindings korrek is. Indien 'n hof van appèl, met behoorlike inagneming van die bevindings van die verhoorhof, die redes daarvoor en die voordele wat die verhoorhof het soos om die getuies te sien en te hoor in die atmosfeer wat heers tydens die verhoor, van mening is dat die verhoorhof se feitebevindings verkeerd is en dat die beskuldigde verkeerdelik

skuldig bevind is, moet die hof van appèl inmeng. In die proses moet die voordele wat die verhoorhof het nie oorskat word nie ‘lest the appellant’s right of appeal becomes illusory’ (sien *Protea Assurance Co Ltd v Casey* 1970 (2) SA 643 (A) te 648E).

[41] Op die appellant se weergawe het 'n meisie tot wie hy klaarblyklik seksueel aangetrokke gevoel het talle kere langs hom op sy bed, in haar slaapklere, onder 'n kombers of duvet gelê of gesit en televisie kyk en het hy nooit seksuele toenadering tot haar gesoek tot een goeie dag toe hy haar en sy hom op die mees intieme wyse betas het terwyl sy vrou langs hom op die bed lê en slaap het. Alhoewel hy nie gedink het dat hy moreel verkeerd opgetree het nie en alhoewel hy steeds gereelde kontak met die klaagster gehad het en ‘moontlik’ weer saam met haar op die bed televisie gekyk het, het hy nie weer aan die voorval gedink nie en het, nie hy of sy, vir etlike maande seksuele toenadering tot mekaar gesoek nie tot een goeie dag toe sy in sy aantrekkamer/badkamer instap terwyl hy besig was om homself af te droog en sy hom 'n passievolle soen gee wat uitloop op gemeenskap in sy aantrekkamer terwyl sy vrou enige oomblik kon terugkeer na die huis. Daarna beskuldig sy hom van seksuele teistering en herhaalde verkragtings oor 'n tydperk van ongeveer twee jaar.

[42] Na my mening het die verhoorlanddros tereg bevind dat die appellant se getuienis, dat daar slegs die enkele gevalle van betasting en gemeenskap was, onwaarskynlik is.

[43] Vir die redes hierna genoem is ek egter van mening dat die klaagster se getuienis, meer spesifiek haar getuienis dat sy nie toegestem het tot die betasting en gemeenskap, eweneens onwaarskynlik is. Ek is verder van mening dat die verhoorlanddros en waarskynlik ook die hof *a quo* tot so'n mate gekonsentreer het op die vraag of daar meerdere gevalle van betasting was soos deur klaagster getuig, dat nie voldoende oorweging geskenk is aan die waarskynlikheid van die klaagster se weergawe spesifiek met betrekking tot toestemming nie. Hulle het gevolglik van die waarskynlikhede waarna ek hierna sal verwys, óf misgekyk óf verkeerd beoordeel. Die verhoorlanddros het ook soos ek hieronder sal aandui na my mening verkeerde feitebevindings gemaak ten aansien van hierdie vraag.

[44] Die vraag is nie soseer of daar meerdere gevalle van betasting en gemeenskap was nie. Die vraag is of bo redelike twyfel bewys is dat die betasting en die gemeenskap waaraan die appellant skuldig bevind is sonder die toestemming van die klaagster geskied het. Indien daar 'n redelike moontlikheid bestaan dat dit met die toestemming van die klaagster geskied het is die appellant verkeerdelik skuldig bevind aan onsedelike aanranding en verkragting. Wat die appellant, 'n bykans 40-jarige ervare getroude man met kinders van sy eie gedoen het met die klaagster, 'n jong skoolgaande meisie wat op sy eie getuienis hom gerespekteer het, wie se vertroueling hy was en wat soos 'n kind in die huis was, is 'n skande en moreel afkeurenswaardig. Dit is so of die klaagster nou toegestem het daartoe of nie. Die appellant het self erken dat hy later besef het dat wat hy gedoen het moreel verkeerd was. Aangesien die

klaagster egter ouer as 12 jaar was, het hy nie die gemeneregtelike misdaad van onsedelike aanranding of verkragting gepleeg indien sy toegestem het nie.[2]

[45] Die advokaat vir die staat het tereg betoog dat oorgawe sonder teëstribbeling nie noodwendig dui op toestemming nie. Sien in hierdie verband *R v Swiggelaar* 1950 (1) PH H61 (A):

> 'Submission by itself is no grant of consent, and if a man so intimidates a woman as to induce her to abandon resistance and submit to intercourse to which she is unwilling, he commits the crime of rape. All the circumstances must be taken into account to determine whether passivity is proof of implied consent or whether it is merely the abandonment of outward resistance which the woman, while persisting in her objection to intercourse, is afraid to display or realises is useless.'

In hierdie saak ontstaan die probleem om te onderskei tussen oorgawe sonder teëstribbeling en toestemming egter nie want volgens die klaagster het sy teëgestribbel en het sy haarself fisies verset teen die appellant. Die vraag is dus bloot of haar getuienis dat sy daadwerklik geweier het dat sy betas word en dat gemeenskap met haar gehou word bo redelike twyfel aanvaar kan word. Die volgende oorwegings dui op die teendeel.

[46] In die eerste plek is dit ietwat onwaarskynlik dat die appellant die klaagster teen haar wil sou betas op die wyse deur haar beskryf terwyl sy vrou langsaan gebad het met die deur na die badkamer halfpad oop. Dit is nog meer onwaarskynlik dat die appellant, soos getuig deur die klaagster, daarna op ander geleenthede, teen haar wil, haar knope sou losmaak en haar borste sou betas terwyl sy vrou wakker langs hom op die bed lê. Dit is veral onwaarskynlik in die

[2] R v Z 1960 (1) SA 739 (A) op 742E.

lig van die feit dat nie net op die appellant se getuienis maar ook op die klaagster se getuienis die appellant op ander geleenthede versigtig was dat sy vrou nie uitvind wat aan die gang was nie. Dit is ook moeilik om die klaagster se getuienis dat sy die appellant se hand vasgedruk het ‘sodat hy dit kan uittrek’ te verstaan en dit is eienaardig dat haar getuienis dat sy met albei hande gepoog het om sy hand weg te trek eers op 'n veel later stadium in haar getuienis gegee is. Die klaagster het aanvanklik getuig dat sy probeer het om op te staan maar dat sy nie kon nie. Later het sy egter getuig dat sy nie probeer het om op te staan nie. Sy kon geen verduideliking gee hoekom sy nie geloop het nie. Sy het eers te kenne gegee dat sy haar bene toegeknyp het en daarna toegegee dat sy dit nie gedoen het nie. Die klaagster se optrede na die voorval spreek ook teen haar getuienis dat sy onsedelik aangerand is. Kort na die voorval het die klaagster die appellant naamlik gaan gelukwens met sy verjaarsdag en blyk dit nie dat sy beswaar gemaak het toe hy haar meer as 'n gewone soen gegee het en haar borste betas het nie. Sy het getuig dat sy herhaaldelik teruggegaan het na die Marxse se woning omrede sy nie vir mev Marx as 'n vriendin wou verloor nie, sy het gevoel dat sy dit aan haar verskuldig was want mev Marx het so baie vir haar gedoen en die minste wat sy kon doen was om mev Marx te help. Ek vind dit moeilik om te aanvaar dat daar al so’n hegte verhouding kon bestaan op die stadium toe die betastingsvoorval in die bed plaasgevind het. Dit het naamlik gebeur hoogstens drie maande nadat die klaagster die eerste keer die appellant se kinders opgepas het (indien die ontmoetingsdatum soos verstrek in die klaagster se verklaaring aan die polisie aanvaar word, slegs 'n maand daarna). In die lig

daarvan dat sy telkens langs die appellant in die bed gaan lê het en telkens die risiko geloop het dat mev Marx kon agterkom wat langs haar in die bed aangaan, vind ek dit moeilik om te aanvaar dat die klaagster nie uitnodigings om op die bed te lê van die hand wou wys nie uit vrees dat mev Marx sou agterdogtig raak. Dit is nog moeiliker om te aanvaar in die lig van haar getuienis dat sy wel bereid was om op te staan en na haar kamer te gaan toe die appellant by geleentheid vatterig met sy vrou geraak het en sy van mening was dat hy dit gedoen het om haar uit te tart. Toe dit gebeur het, het sy besluit dat sy genoeg gehad het en dat sy nie sou toelaat dat die appellant verder met haar ‘mors’ nie.

[47] Die appellant het die klaagster voor die beweerde verkragting verskeie kere op die mees intieme wyse betas. Dit het teen die tyd wat die eerste gemeenskap plaasgevind het al oor en oor gebeur op sy bed in sy slaapkamer terwyl sy vrou langs hom lê. Hy het al in sy onderbroek na haar gekom waar sy in die studeerkamer vir hom gewag het terwyl sy vrou nie tuis was nie en haar versoek om aan sy geslagsdeel te vat en hy het hom al teen haar gemasturbeer. Hy het ook meerdere kere te kenne gegee dat hy met haar gemeenskap wou hê. Op die dag toe die beweerde verkragting plaasgevind het, het hy verskeie kere so te kenne gegee en het hy haar ‘gesoen en probeer vat aan (haar) en alles’. Haar getuienis oor hoe dit gekom het dat sy haar daarna in die appellant se aantrekkamer bevind het, is nie bevredigend nie. Sy het getuig dat die appellant haar geroep het en dat hy gesê het dat sy na iets moet kom kyk. Sy het afgelei dat hy in die gang was en dat hy vir haar iets wou vra soos om 'n asbak, sigarette of 'n glas water te bring. Toe sy hom nie in die gang aantref nie maar vind dat hy

in die aantrekkamer of die badkamer is, het sy gedink dat hy miskien wou hê dat sy hom moes help soek vir iets en het sy sonder meer die deure van die aantrekkamer oopgemaak en ingestap. Na my mening is dit hoogs onwaarskynlik dat sy nie toe sy na die slaapkamer geroep is en voordat sy die aantrekkamer binnegegaan het geweet het wat die appellant wou doen nie. Tog het sy die deure oopgemaak en ingegaan en selfs toe sy sien dat hy sy broek afgetrek het en 'n kondoom aangesit het, het sy nie weggeloop nie. Die verhoorlanddros het skynbaar sonder meer die klaagster se getuienis aangaande die rede waarom sy die appellant se aantrekkamer binnegegaan het, aanvaar. Na my mening het hy fouteer. In die lig van die voorafgaande gebeure en die appellant se voorafgaande mededelings aan die klaagster is dit onwaarskynlik dat die klaagster nie geweet wat die appellant wou doen nie.

[48] Die klaagster het self erken dat toe sy die appellant in die badkamer sien sy geweet het dat hy met haar gemeenskap wou hê maar tog het sy nie dadelik weggeloop nie. Die feit dat sy die aantrekkamer binnegegaan het wetende dat die appellant met haar gemeenskap wou hê, beteken natuurlik nie dat sy ingestem het om wel met hom gemeenskap te hê nie. Dit werp egter ten minste twyfel op haar geloofwaardigheid, meer spesifiek haar getuienis dat sy haar verset het teen die appellant se pogings om haar te betas.

[49] Die eerste persoon vir wie die klaagster vertel het van haar verhouding met die appellant was haar tante. Haar getuienis dat sy haar tante vertel het dat sy aanvanklik nee gesê het en dat haar tante gesê het dat sy dan verkrag is,

strook nie met haar tante se getuienis nie en kan vir die volgende redes nie aanvaar word nie:

a) Haar tante het, alhoewel sy versoek is om besonderhede te verstrek van wat die klaagster haar vertel het, geen melding daarvan gemaak nie.

b) Dit is onwaarskynlik dat haar tante sou vergeet het dat die klaagster haar vertel het dat die gemeenskap sonder haar toestemming geskied het of dat sy dit nie sou vermeld indien sy wel so meegedeel is nie. Sy was immers 'n getuie in 'n verkragtingsaak.

c) Op die klaagster se eie getuienis het sy nog lank nadat sy met haar tante gepraat het nie aan die gebeure as verkragting gedink nie. Sy het naamlik self op twee geleenthede getuig dat sy totdat sy dr Van Rooy in September 2000 gespreek het nooit so aan die gebeure gedink het nie. Dit is so dat sy ook by twee geleenthede getuig het dat sy wel aan die gebeure as verkragting gedink het maar, soos reeds hierbo vermeld, is dit waarskynlik die onbestaanbaarheid van haar getuienis van hoe sy verkrag is met haar getuienis dat sy nie aan die gebeure as verkragting gedink het wat haar by tye genoop het om te kenne te gee dat sy wel aan die eerste geval gedink het as verkragting.

[50] Dit is onwaarskynlik dat die klaagster dr Van Rooy vertel het dat die gemeenskap met die appellant sonder toestemming plaasgevind het. As sy dit aan hom vertel het sou sy nie verbaas gewees het om van hom te hoor dat sy verkrag is nie. Dit blyk nie uit sy getuienis dat sy hom dit vertel het nie. Volgens

sy getuienis het hy gemeen dat sy nog onder die ouderdom van 16 was toe die gemeenskap plaasgevind het en het hy vir hierdie rede gemeen dat sy verkrag is.

[51] Die verhoorlandddros was van mening dat niks gemaak kon word van die feit dat die klaagster se tante nie die klaagster se getuienis dat sy haar tante vertel het dat sy nie toestemming gegee het nie, bevestig het nie. Die redes verstrek deur die verhoorlanddros is nie duidelik nie. Aan die een kant skyn hy te aanvaar dat die klaagster nie haar tante vertel het dat sy aanvanklik nee gesê het en sê hy dat dit klink asof die tante dit as vanselfsprekend aanvaar het dat toestemming ontbreek het. Aan die ander kant skyn hy te aanvaar dat sy wel haar tante vertel het. Die probleem word veroorsaak deur die teenstrydigheid in die getuienis van die klaagster en haar tante. Die klaagster se tante se getuienis is nie vatbaar vir die interpretasie dat sy aanvaar het dat die gemeenskap sonder toestemming geskied het nie. Dit is ook nie versoenbaar met die klaagster se getuienis dat sy haar tante volledig ingelig het, dat sy haar tante vertel het dat sy aanvanklik nee gesê het en dat haar tante gesê het dat sy verkrag is as sy nee gesê het nie. Die geskilpunt in die saak is of die klaagster toestemming gegee het tot die aanvanklik gemeenskap met haar. As die klaagster haar tante vertel het dat sy nie sodanige toestemming gegee het nie of feite verstrek het wat dui op verkragting is dit, soos reeds gesê, onwaarskynlik dat haar tante dit sou vergeet het en dat sy dit nie sou vermeld het toe sy gevra is presies wat die klaagster haar vertel het nie.

[52] Indien die gemeenskap met die klaagster teen haar wil geskied het en sy bloot oorgegee het aan die appellant sonder om teë te stribbel of om haar fisies

te verset, sou haar getuienis dat sy nie aan die gebeure, soos deur haar beskryf, as verkragting gedink het nie totdat sy anders geadviseer is, meer verstaanbaar gewees het. Dit is egter nie haar getuienis dat sy so oorgegee het nie. Haar getuienis, alhoewel nie sonder teenstrydighede nie, is dat sy nie alleen ‘nee’ gesê het nie maar dat sy ook fisies oorweldig is. Haar broek is losgemaak terwyl sy gepoog het om dit te verhinder maar sy kon nie want die appellant ‘is baie sterk’. Haar broek en onderklere is afgetrek terwyl sy probeer het om dit vas te hou. Sy het probeer om haar bene toe te hou maar die appellant het hulle oopgetrek en sy is op die grond neergedruk sodat sy nie kon opstaan nie. Wat sy ookal vroeër van die gebeure gedink het, kon sy, op haar weergawe, nadat sy die matriekeksamen afgelê het en sy mense begin vertel het wat met haar gebeur het, onder andere haar tante en haar verloofde, nie anders as om te besef dat sy deur die appellant verkrag is nie.

[53] Die klaagster se getuienis dat sy nooit verlief op die appellant was nie en dat sy self nie gedink het dat sy 'n verhouding met hom het nie is na my mening verkeerdelik deur die verhoorlanddros aanvaar. Haar verduideliking waarom sy nie aan verkragting gedink het nie was juis dat sy gemeen het dat sy 'n verhouding met die appellant gehad het. Dit is wel so dat sy getuig het dat die appellant haar herhaalde male verseker het dat hulle 'n verhouding het maar teen die tyd wat sy haar tante vertel het dat sy 'n verhouding met 'n getroude man het en toe sy dit 10 maande later vir dr Van Rooy gesê het, kon sy darem sekerlik self oordeel of sy 'n verhouding het. Die appellant kon immers net vir haar vertel of, wat hom betref, daar 'n verhouding tussen hulle bestaan en of hy maar net

belangstel in sy eie fisiese bevrediging. Of die klaagster van haar kant af gemeen het dat daar 'n verhouding is, of sy haar maar net onderwerp het aan sy wil en of sy maar net haar fisiese bevrediging nagestreef het, kon hy nie vir haar beantwoord nie. Synde 'n meisie wat matriek geslaag het en wat die wedervaringe gehad het wat sy gehad het, is dit moeilik om te glo dat sy in September 2000 nog kon gedink het dat sy en die appellant 'n verhouding gehad het bloot omrede die appellant so gesê het terwyl sy geen gevoel vir hom gehad het nie. Die klaagster se reaksie toe die appellant by geleentheid sy vrou geliefkoos het, dui op moontlike jaloesie en verleen stawing daaraan dat wat haar betref sy 'n verhouding met die appellant gehad het. Verdere stawing hiervan is die feit dat die klaagster herhaaldelik teruggegaan het na die appellant en telkens weer saam met hom in die bed geklim het.

[54] Na my mening is dit onwaarskynlik dat die klaagster telkens teruggegaan het na die appellant se huis vir die redes deur haar aangevoer. Dit blyk uit die klaagster se getuienis en die uitspraak van die verhoorlanddros dat sy 'n intelligente persoon is wat haar nie willoos herwaarts en derwaarts laat stoot nie. Daar is geen suggestie dat sy sedert die betastingsvoorval toe sy ongeveer 16 jaar oud was 'n persoonlikheidsverandering ondergaan het nie. Tog wil sy te kenne gee dat sy nadat sy haar aanvanklik teen die appellant verset het toegelaat het dat hy haar teen haar wil na willekeur verkrag en betas totdat sy ongeveer 18 jaar oud was en die matriekeksamen afgelê het. Sy het dit nie gedoen omdat sy enige liefdesgevoel teenoor die appellant gehad het nie, sê sy, maar wel omrede

sy lief was vir mev Marx en die kinders en haar eie huislike omstandighede swak was.

[55] Dit is duidelik dat die klaagster se huislike omstandighede swak was maar sy het ten minste 'n huis gehad en daar is geen suggestie dat sy swak behandel is by die huis anders as dat sy nie genoeg aandag gekry het nie. Verder dui haar beskrywing van haar pa daarop dat die verhouding tussen haar en haar pa nie uitermate swak kon wees nie. Sy het naamlik getuig dat haar pa haar vertrou het en dat sy hom nie wou seermaak en veroorsaak dat hy sy vertroue in haar verloor nie. Die huislike omstandighede in die Marx huishouding blyk eweneens swak te gewees het. Die klaagster het self getuig dat mev Marx ‘hel het onder Johan Marx’. Desnieteenstaande wil die klaagster te kenne gee dat swak huislike omstandighede `n rede is waarom sy keer op keer na die appellant se huis, waar sy herhaaldelik teen haar wil verkrag en voortdurend seksueel geteister is, teruggegaan het. Sy het dit nie alleen vrywilliglik maar ook teen die verbod van haar pa gedoen. Indien die klaagster inderdaad, vir die redes deur haar genoem, herhaaldelik teruggegaan het na die appellant se huis, terwyl die appellant se attensies haar nie aangestaan het nie, sou sy ten minste haar bes gedoen het om geleenthede te vermy waar sy en die appellant alleen in mekaar se geselskap was. Dit is egter duidelik dat sy en die appellant talle male alleen in mekaar se geselskap was terwyl mev Marx uithuisig was. Dit het soveel keer gebeur dat ek nie kan aanvaar dat die klaagster gepoog het om sulke geleenthede te vermy nie. Haar skatting is dat sy ongeveer 13 keer met die appellant gemeenskap gehad het op plekke soos die slaapkamerbed of die rusbank.

[56] Nog 'n rede wat die klaagster aanvoer waarom sy telkemale ingestem het om weer na die appellant se huis te gaan is dat sy gevoel het sy is dit aan mev Marx verskuldig om haar te help. Sy wou ook nie iets doen wat mev Marx agterdogtig sou maak nie want sy wou nie die huwelik opbreek en aan die kinders doen wat aan haar gedoen is nie. Dit is moeilik om te aanvaar dat dit nie vir haar duidelik was dat haar teenwoordigheid in die huis 'n baie beter kans gehad het om probleme in mev Marx se huwelik te veroorsaak nie.

[57] Die klaagster het getuig: '[E]k is hatig teenoor Johan Marx, ek wil hom terugkry en ek wil hê hy moet weet, dit wat hy doen, hy gaan een of ander tyd uitgevang word.' Later het sy egter getuig dat sy hom met 'n passie gehaat het vir wat hy aan haar gedoen het maar dat sy hom vergewe het. Die vraag ontstaan waarom dan en waarom sou sy 'n klag van verkragting en onsedelike aanranding teen hom lê as dit nie is omdat hy haar verkrag het nie. Beide die verhoorlanddros en die hof *a quo* het aanvaar dat 'n verhouding wat skeef geloop het moontlik die oorsaak kon wees maar het bevind dat daar nie sprake kan wees van laasgenoemde nie omrede beide die appellant en die klaagster getuig het dat daar nie 'n verhouding was nie. Die verhoorlanddros het geredeneer dat aangesien daar nie 'n verhouding tussen die appellant en klaagster bestaan het nie was daar geen rede vir jaloesie aan die kant van die klaagster nie en is die enigste gevolgtrekking waartoe gekom kon word dat die appellant sonder die klaagster se toestemming gehandel het. Die hof *a quo* was ook van mening dat indien daar nie 'n liefdesverhouding was nie daar geen rede blyk te wees waarom die klaagster die appellant van verkragting sou beskuldig indien

gemeenskap met haar toestemming plaasgevind het nie. Soos hierbo aangedui meen ek dat beide fouteer het deur te bevind dat daar, wat die klaagster betref, geen verhouding tussen haar en die appellant was nie en dat daar gevolglik geen rede vir die klaagster was om jaloers te wees nie. Na my mening is dit duidelik dat die klaagster gemeen het dat daar 'n verhouding was en dat daar aanduidings van moontlike jaloesie aan die kant van die klaagster is.

[58] Die verhoorlanddros en die hof *a quo* het egter na my mening ook gefouteer om te bevind dat indien geen verhouding bestaan het nie die enigste afleiding wat uit die klaagster se afkeur vir die appellant gemaak kan word, is dat die appellant sonder haar toestemming gehandel het. Indien daar wat die appellant betref geen verhouding was nie, het hy valslik aan die klaagster voorgegee dat daar wat hom betref wel 'n verhouding tussen hulle was en was daar vir die klaagster goeie rede om veronreg te voel. Die klaagster het haar tante vertel dat sy vuil en skuldig voel omdat die man wat ‘dit’ met haar gedoen het, getroud is en sy lief is vir sy vrou en kinders. Die klaagster het alle rede gehad om so te voel of sy nou aanvanklik toegestem het of nie. Sy is ook heeltemal geregtig om die appellant ten minste gedeeltelik hiervoor verantwoordelik te hou of sy toestemming gegee het al dan nie. Daar is geen rede om haar getuienis dat hy die dominante persoon in die verhouding was nie te aanvaar nie. Hy het sy posisie teenoor haar misbruik en soos reeds gesê is sy optrede skandalig en moreel afkeurenswaardig. Die feit dat sy so 'n afkeur in die appellant het, kan gevolglik netsowel daaraan te wyte wees dat sy nou meen dat hy haar verlei het en valslik voorgegee het dat hulle, wat hom betref, 'n

verhouding het, dit wil sê dat hy lief is vir haar terwyl hy haar inderdaad net misbruik het.

[59] Die hof *a quo* het verder stawing vir die klaagster se weergawe gevind in die feit dat sy gedurende 1998 twee pogings aangewend het om haarself om die lewe te bring. Uit die klaagster se eie getuienis het dit egter geblyk dat sy gedurende 1998 verskeie ander redes gehad het om depressief te wees. Verder was die getuienis van dr Van Rooy dat indien die klaagster 'n vrywillige party tot die seksuele toenadering ter sprake was, kon sy nog steeds tot dieselfde mate dieselfde simptome ontwikkel het. In die lig van hierdie getuienis meen ek nie dat die klaagster se sielkundige probleme enige stawing bied vir 'n bevinding dat betasting en gemeenskap sonder haar toestemming plaasgevind het nie.

[60] Soos reeds vermeld was dit vir die klaagster nuus om van dr Van Rooy te hoor dat sy verkrag is. Volgens sy getuienis was hy onder die indruk dat sy onder die ouderdom van 16 jaar was toe die gebeure plaasgevind het en was dit die rede waarom hy van mening was dat sy verkrag is. Dit is hierdie mededeling wat anleiding gegee het tot die klagte teen die appellant. Sy het naamlik dr Van Rooy se mededeling aan haar verloofde oorgedra, hy het haar oorreed om haar ouers in te lig en haar pa het toe vir haar gesê om dit verder te voer.

[61] Teen die tyd wat die klaagster met dr Van Rooy in September 2000 gepraat het, het sy die gebeure al met haar tante en met haar verloofde bespreek en moes sy al baie daaroor nagedink het, maar selfs op daardie stadium het sy volgens haar getuienis nie gedink dat sy verkrag was nie. Soos reeds vermeld het die gebeure in haar oë waarskynlik eers verkragting geword nadat sy deur dr

Van Rooy, op die basis dat sy nog onder die ouderdom van 16 jaar was en gevolglik nie, wat die statutêre misdryf betref, kon toestem nie, meegedeel is dat sy verkrag is. Dit is onwaarskynlik dat dit die geval sou wees indien die appellant haar forseer het om met hom gemeenskap te hê op die wyse deur haar getuig.

[62] Ek is vir die voormelde redes van mening dat die klaagster se getuienis aangaande haar weiering om met die appellant gemeenskap te hê deurspek is met onwaarskynlikhede. Aan die een kant is daar dus die appellant se onwaarskynlike weergawe, wat na my mening tereg deur die verhoorlanddros verwerp is, dat daar net een geval van betasting en een geval van gemeenskap was. Aan die ander kant is daar die klaagster se onwaarskynlike weergawe dat daar talle gevalle van betasting en talle gevalle van gemeenskap sonder haar toestemming was.

[63] Die verhoorlanddros se basiese benadering tot die saak blyk uit die die volgende pasasie aan die begin van sy uitspraak:

> ‘Die saak gaan eintlik oor die klaagster se woord teen die beskuldigde s’n. Die klaagster sê een ding, die beskuldigde 'n ander. In 'n sekere sin is die saak maklik. Of jy glo die klaagster, of jy glo die beskuldigde. Dan aan die anderkant is die saak weer uiters moeilik, want wie glo mens nou eintlik.’

Hierdie benadering is verkeerd. Die verwerping van die appellant se getuienis het nie noodwendig tot gevolg die aanvaarding van die klaagster se weergawe nie. Steeds moet bepaal word of bo redelike twyfel bevind kan word dat die klaagster se weergawe dat daar geen toestemming was, waar is.

[64] By die beoordeling van hierdie vraag is die feit dat die appellant leuenagtige getuienis gegee het 'n faktor ten gunste van die staatsaak. Hierdie hof het egter al herhaaldelik gewaarsku dat daarteen gewaak moet word om nie oormatige gewig aan hierdie faktor te gee nie. Die korrekte benadering is soos volg uiteengesit deur Smalberger Wn AR in *S v Mtsweni* 1985 (1) SA 590 (A) op 593I-594D:

'Terwyl die leuenagtige getuienis of ontkenning van 'n beskuldigde van belang is wanneer dit by die aflei van gevolgtrekkings en die bepaling van skuld kom, moet daar teen gewaak word om oormatige gewig daaraan te verleen. Veral moet daar gewaak word teen 'n afleiding dat, omdat 'n beskuldigde 'n leuenaar is, hy daarom waarskynlik skuldig is. Leuenagtige getuienis of 'n valse verklaring regverdig nie altyd die uiterste afleiding nie. Die gewig wat daaraan verleen word, moet met die omstandighede van elke geval verband hou. Hierdie benadering is onlangs bevestig in *S v Steynberg* 1983 (3) SA 140 (A) waarin the denkrigting in *R v Mlambo* 1957 (4) SA 727 (A) op 738B - D en die aanvaarde uitgangspunt in *Goodrich v Goodrich* 1946 AD 390 op 396 in oënskou geneem is, en die korrekte toepassing van die *Mlambo*-benadering toegelig is. By die beoordeling van leuenagtige getuienis deur 'n beskuldigde moet daar, onder meer, gelet word op:

(a) Die aard, omvang en wesenlikheid van die leuens, en of hulle noodwendig op 'n skuldbesef dui.

(b) Die beskuldigde se ouderdom, ontwikkelingspeil, kulturele en maatskaplike agtergrond en stand in soverre hulle 'n verduideliking vir sy leuens kan bied.

(c) Moontlike redes waarom mense hulle tot leuens wend, byvoorbeeld omdat in 'n gegewe geval 'n leuen meer aanneemlik as die waarheid mag klink.

(d) Die neiging wat by sommige mense mag ontstaan om die waarheid te ontken uit vrees dat hulle by 'n misdaad betrek gaan word, of omdat hulle vrees dat

> erkenning van hulle betrokkenheid by 'n voorval of misdaad, hoe gering ook al, gevare inhou van 'n afleiding van deelname en skuld buite verhouding tot die waarheid.'

[65] Indien aan geen rede gedink kan word waarom die appellant nie sou toegee dat daar betasting en gemeenskap was soos deur die klaagster beweer anders as dat dit nie met toestemming geskied het nie sal die feit dat hy valslik die betastings en gemeenskap ontken het klaarblyklik sterker ondersteuning aan die staatsaak bied as wat die geval sou wees indien daar 'n ander rede vir die valse getuienis is. In laasgenoemde geval is die enigste redelik moontlike afleiding nie dat hy skuldig is aan betasting van en gemeenskap met die klaagster sonder haar toestemming nie.

[66] In hierdie geval is daar meerdere moontlike redes vir die appellant se valse getuienis. In die eerste plek sou 'n erkenning van die betasting waaraan hy skuldig bevind is hom skuldig gemaak het aan die statutêre oortreding van onsedelike aanranding al het dit met toestemming geskied mits behoorlike bewys is dat die klaagster inderdaad nog nie 16 jaar oud was op daardie stadium nie. Herhaalde gevalle van gemeenskap met die veel jonger skoolgaande klaagster sou hom ook as 'n getroude man in 'n baie slegter lig gestel het al het die klaagster daartoe toegestem. Dit sou die geval wees nie alleen teenoor sy vrou en kinders nie maar ook teenoor die gemeenskap in die algemeen.

[67] Die verhoorlanddros wat die klaagster tydens 'n lang kruisondervraging onder oë gehad het, het bevind dat sy 'n geloofwaardige getuie is. Hy het tereg bevind dat die klaagster bereid was om toegewings ten gunste van die appellant

te maak. Sy het byvoorbeeld getuig dat sy nie haar bene tydens die eerste betastingsvoorval toegeknyp het nie (die toegewing het wel gekom onder kruisondervraging nadat sy eers gesê het dat sy wel haar bene toegeknyp het), dat sy nie tydens die betastingsvoorval gepoog het om op te staan nie (ook in dié geval het die toegewing gekom onder kruisondervraging nadat sy eers getuig het dat sy wel gepoog het om op te staan), en dat sy by 'n geleentheid wat die appellant haar betas het 'n lekker gevoel gekry het. Dit moet egter nie uit die oog verloor word dat haar getuienis in baie opsigte waarskynlik waar is. Soos die verhoorlanddros meen ek dat dit baie onwaarskynlik is dat sy veelvuldige gevalle van gemeenskap en betasting oor 'n periode van twee jaar sou fabriseer. Sy kon geen voordeel daaruit trek om dit te doen nie. Dit moet egter ook nie uit die oog verloor word dat al wat nodig is om 'n geval van gemeenskap met toestemming in verkragting te omskep die weglating van 'n paar woorde of die toevoeging van 'n paar woorde is. Verder is die klaagster, wat tans 'n getroude vrou is, se weergawe van wat gesê is en gedoen is tydens 'n spesifieke voorval, waarvan daar talle ander was, vyf jaar vantevore toe sy in standard nege op skool was, na my mening besonder onbetroubaar. Meer betroubaar is na my mening haar herinnering van hoe sy dit ervaar het. Alhoewel nie konsekwent is haar getuienis in hierdie verband, soos reeds aangetoon, dat sy dit nie as verkragting beskou het nie tot op 'n later stadium toe aan haar gesê is dat dit verkragting was vir 'n heel ander rede as dat sy nie toegestem het nie. Die verhoorlanddros het self bevind dat die klaagster nie altyd ewe indrukwekend vertoon het nie. Hierby moet nog gevoeg word dat dit blyk uit die klaagster se

getuienis dat sy ook soms haar getuienis aangepas het tot haar voordeel en tot die appellant se nadeel. So byvoorbeeld het sy getuig dat sy die appellant haat, net om daarna te sê dat sy haar God gevind het en hom vergewe het; dat sy 'n verhouding met die appellant gehad het, net om daarna te se dat sy nie 'n verhouding met hom gehad het nie; dat sy nie aan die voorval as verkragting gedink het nie, net om daarna te sê dat sy wel aan die eerste voorval as verkragting gedink het; en dat sy nie meen dat die appellant haar voor die beweerde verkragting aan die arm gevat het om te verhinder dat sy weghardloop nie net om daarna te getuig dat sy wel meen dat hy haar aan die hand gevat het om te verhinder dat sy uit die kamer kon wegkom.

[68] In die lig van die voorgaande en nieteenstaande die feit dat die appellant se getuienis verwerp is, asook die verhoorlanddros se indruk van die klaagster as 'n getuie, meen ek dat die verhoorlanddros fouteer het om te bevind dat bo redelike twyfel bewys is dat die betastingsvoorval en die gemeenskap op 31 Maart 1998 sonder die toestemming van die klaagster plaasgevind het.

Die appellant is dus verkeerdelik aan die gemeneregtelike oortredings van onsedelike aanranding en verkragting waarvan hy aangekla is, skuldig bevind.

[69] Volgens die klaagster het sy op 9 Oktober 1981 16 jaar oud geword en was sy 15 jaar oud toe die betastingsvoorval gedurende die September skoolvakansie van 1997 plaasgevind het. Artikel 14(1)(a) en (b) van die Wet op Seksuele Misdrywe 23 van 1957 bepaal:

‘14 Seksuele misdrywe met jeugdiges

(1) Enige manspersoon wat-

(a) ontug met 'n meisie onder die ouderdom van 16 jaar pleeg of probeer pleeg; of

(b) 'n onsedelike of onbehoorlike daad met so 'n meisie of met 'n seun onder die ouderdom van 19 jaar pleeg of probeer pleeg; of

(c) so 'n meisie of seun uitlok of aanlok om 'n onsedelike of onbehoorlike daad te pleeg, is aan 'n misdryf skuldig.'

[70] Ingevolge art 261 van die Strafproseswet 51 van 1977 kan, indien die getuienis op `n aanklag van onsedelike aanranding nie die misdryf onsedelike aanranding bewys nie maar wel die statutêre misdryf van die pleeg van `n onsedelike of onbehoorlike daad met `n meisie onder `n bepaalde ouderdom, die beskuldigde aan die statutêre misdryf skuldig bevind word.

[71] Die staat het egter tydens die aanhoor van die appèl aangedui dat nie vir `n skuldigbevinding aan enige van die statutêre oortredings gevra word nie omrede volgens die mening van die staat die ouderdom van die klaagster nie behoorlik bewys is nie. Nie een van die partye het ons gevolglik ten aansien van die statutêre misdryf toegespreek nie. Na die aanhoor van die appèl het dit egter geblyk dat die toegewing deur die staat moontlik foutief was en is die partye uitgenooi om skriftelike betoog voor te lê ten aansien van die vraag 'waarom nie bevind kan word dat wel bewys is dat die klaagster eers op 9 Oktober 1997 16 jaar oud geword het en dat die appellant hom derhalwe skuldig gemaak het aan `n oortreding van die voormelde art 14(1)(b)) nie'. Beide die appellant en die staat het daarop aanvullende hoofde afgelewer.

[72] Die ouderdom van die klaagster was inderdaad gemene saak tydens die verhoor. Nadat die klaagster sonder beswaar van die kant van die appellant getuig het dat sy 15 jaar oud was tydens die betastingsvoorval het die appellant se advokaat dit aan haar gestel dat sy op 9 Oktober 1981 gebore is en het sy dit beaam. Die appellant het dus onomwonde erken dat die klaagster voor 9 Oktober 1981 onder die ouderdom van 16 jaar was en geen formele bewys van daardie feit was nodig nie.[3] Verder, insoverre die getuienis van die klaagster ten aansien van haar geboortedatum hoorsê getuienis was, het die verdediging deur sodanige getuienis by wyse van `n direkte vraag uit te lok in effek toegestem tot die toelating daarvan en was die getuienis gevolglik ingevolge die bepalings van art 3(1)(b) van die Wysigingswet op die Bewysreg 45 van 1988 toelaatbaar.

[73] Die appellant se advokaat betoog nie dat nie bewys is dat die klaagster se geboortedatum 9 Oktober 1981 was nie maar, soos ek hom verstaan, betoog hy dat dit redelik moontlik is dat die betastingsvoorval eers in 1998, toe die klaagster reeds 16 jaar oud was, plaasgevind het. In die verband steun hy op die feit dat die klaagster op `n stadium getuig het dat sy in 1998 15 jaar oud was wat beteken, as dit saam met haar getuienis dat sy 15 jaar oud was toe die betastingsvoorval plaasgevind het, geneem word, dat die betastingsvoorval eers in 1998 toe sy 16 jaar oud was plaasgevind het. Verder steun hy op die feit dat volgens die klagstaat die beweerde onsedelike aanrandings plaasgevind het te

[3] S v W 1963 (3) SA 516 (A) op 523C-F; S v Magubane 1975 (3) SA 288 (N) 291 G-H; S v Gope 1993 (2) SACR 92 (Ck).

Pionierstraat, Durbanville terwyl die appellant eers op 1 Februarie 1998 verhuis het na `n woning geleë te Pionierstraat, Durbanville.

[74] Dit is so dat die klaagster op `n stadium getuig het dat sy gedurende 1998 15 jaar oud was. Dit is egter duidelik dat sy slegs verward geraak het ten aansien van die jaartal. Dit is gemeensaak dat sy vanaf ten minste Augustus 1997 die appellant se kinders by sy huis opgepas het en haar getuienis was deurgaans dat die betastingsvoorval plaasgevind gedurende die eersvolgende September skoolvakansie wat duidelik voor haar 16de verjaarsdag was toe sy die appellant gaan gelukwens het met sy verjaarsdag op dieselfde dag soos hierbo beskryf.

[75] Na my mening is daar nie enige rede om nie die klaagster se getuienis dat die betastingsvoorval plaasgevind het en dat dit plaasgevind het op die tydstip deur haar getuig te aanvaar nie. Die onwaarskynlikhede en onbevredigende aspekte in die klaagster se getuienis het betrekking op die vraag of die betasting deur die appellant en die gemeenskap met die appellant sonder haar toestemming geskied het en nie op die vraag of dit inderdaad plaasgevind het en wanneer dit plaasgevind het nie. Soos reeds gesê stem ek saam met die verhoorlanddros dat dit onwaarskynlik is dat sy veelvuldige gevalle van gemeenskap en betasting oor `n periode van twee jaar sou fabriseer. Sy kon geen voordeel daaruit trek om dit te doen nie. Wat die tydstip waarop die betastingsvoorval ter sprake plaasgevind het, betref kan sy beswaarlik `n fout maak aangesien sy dit kan koppel aan die eersvolgende September skoolvakansie nadat sy by die appellant begin kinders oppas het en ook aan haar 16de verjaarsdag.

[76] Dit is so dat volgens die klagstaat die beweerde onsedelike aanrandings plaasgevind het te Pionierstraat, Durbanville maar die klagstaat beweer ook dat hulle plaasgevind het gedurende die tydperk Augustus 1997 tot Oktober 1999. Dit was deurgaans die klaagster se getuienis dat die appellant eers aan die begin van 1998 verhuis het en dat die betastingsvoorval plaasgevind het voordat die appellant so verhuis het en voor haar 16de verjaardag. Die adres vermeld in die klagstaat was dus klaarblyklik verkeerd aangegee vir soverre dit betrekking het op 1997.

[77] Na my mening is bo redelike twyfel bewys dat die klaagster nog onder die ouderdom van 16 jaar was toe die betastingsvoorval plaasgevind het. Die appellant het nie aangevoer dat hy nie bewus was dat `n onsedelike of onbehoorlike daad met `n meisie onder die ouderdom van 16 jaar `n misdryf daarstel nie of dat hy nie bewus was of nie die moontlikheid voorsien het dat die klaagster onder die ouderdom van 16 jaar was tydens die betastingvoorval nie. Die appellant se advokaat het tereg ook nie betoog dat indien wel bewys is dat die betastingvoorval plaasgevind het en dat die klaagster daartydens onder die ouderdom van 16 jaar was die appellant nie aan `n oortreding van art 14(1)(b) skuldig bevind behoort te word nie.

[78] Onder die omstandighede is ek tevrede dat bo redelike twyfel bewys is dat die appellant homself skuldig gemaak het aan `n oortreding van art 14(1)(b).

[79] Ten aansien van vonnis ten opsigte van hierdie oortreding het die appellant se advokaat aangevoer dat `n opgeskorte vonnis van gevangenisstraf aangewese is alternatiewelik dat die appellant tot korrektiewe toesig gevonnis

behoort te word. Die staat het nie gevra vir `n vonnis van direkte gevangenisstraf ten opsigte van die statutêre oortreding nie maar het betoog dat `n vonnis van korrektiewe toesig `n gepaste straf sal wees.

[80] In die lig van die feit dat die klaagster ten tyde van die misdaad bykans 16 jaar oud was op welke stadium die appellant se dade nie meer die statutêre misdryf daar sou stel nie, meen ek dat korrektiewe toesig moontlik wel `n gepaste straf sal wees. Aangesien korrektiewe toesig egter nie `n opsie was nadat die appellant skuldig bevind is aan die gemeneregtelike oortredings van verkragting en onsedelike aanranding nie is geen getuienis voor die hof geplaas ten aansien van die toepaslikheid van so'n vonnis in die geval van die appellant nie. Artikel 276A van die Strafproseswet 51 van 1977 vereis `n verslag van `n proefbeampte of `n korrektiewe beampte alvorens`n veroordeelde persoon tot korrektiewe toesig ingevolge art 275(h) van daardie wet gevonnis word. Onder die omstandighede meen ek dat die saak terugverwys moet word na die verhoorhof vir die oplegging van vonnis na die aanhoor van verdere getuienis en betoog ten opsigte daarvan.

[81] Die volgende bevel word gevolglik gemaak:

1 Die appèl word gehandhaaf en die bevel van die hof a quo word tersyde gestel.

2 Die skuldigbevindings deur die verhoorhof word tersyde gestel en vervang met die volgende:

'Die beskuldigde word skuldig bevind aan `n oortreding van art 14(1)(b) van die Wet op Seksuele Misdrywe 23 van 1957.'

3 Die vonnisse deur die verhoorhof opgelê word tersyde gestel en die saak word na die verhoorhof terugverwys vir die oplegging van vonnis.

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STREICHER AR

CAMERON JA

[82] I have had the benefit of reading the judgment of my colleague Streicher JA but regret that I cannot agree with his approach to the evidence or with his conclusions. This judgment was prepared initially in response to his. I have since then had the benefit of reading the judgment also of my colleague Nugent JA, who agrees with the conclusions regarding the appeal, though not all the reasoning, of Streicher JA.

[83] This case is about an adult's sexual predation on his children's teenage babysitter who became an intimate of the family. On that we appear to agree. We differ on whether the state proved that the predatory acts constituted the crimes of indecent assault and rape. They started when the complainant was fifteen and led to intercourse when she was sixteen. The question on appeal is whether the evidence left a reasonable possibility that she consented to the first genital groping and to the first intercourse.

[84] The complainant testified that she refused consent to these first acts. The complexity in the case arises from the fact that despite this, she remained deeply enmeshed with the appellant and his family for two years, during which she testified that she later did consent to sex. The regional magistrate accepted her evidence, and convicted the appellant of indecent assault and rape. The Cape High Court (Thring J, Whitehead AJ concurring) dismissed his appeal, but granted leave for this further appeal.

[85] My colleagues and I differ in our approach to the details of the complainant's evidence, and to the evidence the state called to corroborate it. But the difference between us is more fundamental. It lies in our approach to the essentials of the situation the complainant's evidence in my view depicted: that of a young girl in a family-like relation to a man who subjects her to sexual conduct which, despite its non-consensual beginnings, thereafter became at least partly consensual. Although they discard the appellant's version as unworthy of credence, my colleagues consider that the state's attempt to prove the complainant's depiction of this situation founders on improbabilities in her evidence.

[86] Many of the differences in approach to the details in my view stem from the measure of inherent plausibility one attributes to the fundamentals of the account itself. My colleagues both consider it improbable that the complainant, a young girl who claimed to have been subjected to sex against her will, would have continued to associate with a man who continued to foist himself on her. I differ. I do not consider it improbable at all. On the contrary, in my view,

despite flaws, the complainant's account was compellingly convincing, and the trial court magistrate and the High Court were correct to believe her, to accept the corroboration offered by the state, and to convict the appellant of rape and indecent assault.

Background to the charges

[87] In the winter of 1997, Marlese Douglas, the complainant, was fifteen. She was a schoolgirl in standard eight at Durbanville High School. She met the appellant one Saturday afternoon while he was watching rugby with her father at her parents' home. He said that he was looking for a young girl (*meisie*) who could help mind his children, Lise-Ann and Herman, then respectively in grade 4 and grade 2. He suggested she baby-sit for him and his wife that evening. The complainant needed the pocket money and readily agreed.

[88] The arrangement was a success, for the next weekend she baby-sat again. Thereafter she went to baby-sit almost every weekend. The Marx residence was until February 1998 very close to her own home. She started sleeping over. On these occasions she slept in the children's bedroom. She became closely involved with the family, and formed deep attachments to the appellant, his wife and their two children.

[89] She called the appellant 'oom Johan' and his wife 'tannie Lettie' – appellations that signify not merely a generational gap (for the appellant, at nearly 40, was the same age as her father), but respect and deference to the authority of elders. Even though the appellant later invited her to call him 'Johan' when they were alone, she continued to call him 'oom' at all times.

[90] Soon after their first meeting, 'tannie Lettie' came to seek her out. She asked her help in doing 'listings' for her estate agency business. So the two of them drove around together, the complainant helping Mrs Marx with her work and getting involved in the business. Even when the complainant was not baby-sitting on Saturday evenings, she would pay the 'tannie' a visit on a Friday evening. She found that her girlfriends were 'doing their own thing' over weekends, and didn't want to be alone at home. Often Mrs Marx would invite her to her bedroom to watch videos, or to pluck her eyebrows, or even just to sit with her.

[91] They got on extremely well, and became close: and Mrs Marx would phone her and ask her to do this or that favour for her. The complainant was 'mad about' this sort of thing, because she felt she was helping Mrs Marx. She enjoyed doing tasks for Mrs Marx and liked spending time with her and the children. So they did many things together, working in the garden, answering the business's telephones and doing its books.

[92] For her part Mrs Marx also confided in the complainant. She told her often that there were problems in her marriage, but that she had to think of her children. And she gave the complainant friendship, asked her about her woes and worries, and – what signified 'the world' to the complainant – she had an affectionate nickname for her, saying to her, 'Marrie, I love you very much and I want to be as a friend to you'. 'To me she was like a second mother', the complainant testified, 'like a friend.' Later Mrs Marx lent her jewellery for her

school-leaving dance. The complainant derived so much friendship and support from Mrs Marx that at one stage she wished to leave home to reside with her.

[93] At this time in her own household there was a lack of love and support. During 1997 and 1998 her parents were experiencing a severe financial crisis. Her father had previously lost everything – house, car, vehicles – and she feared further financial disaster. Home did not at that stage offer much love or attention. There was 'a constant quarrelling'. And the complainant was seeking attention, searching for people who cared, persons who would notice her, 'who see that I am there, who care for me and can do things with me or to whom I can talk if I have a problem or with whom I can feel at ease'.

[94] Apart from financial difficulties at home, the complainant had experienced 'very difficult' childhood years, which led to her receiving treatment from a number of psychologists: she could not in evidence recall all their names. Her biological parents had never married. Her mother and her step-father (whom she regarded as her father) had twice divorced. She was eight when the second divorce occurred, and proved unable to deal with it. This was the first occasion on which she received psychological treatment. During 1998 and 1999 her parents again considered divorce.

[95] Her father's financial woes in 1997 and 1998 caused the complainant great emotional difficulties. She experienced her parents' problems intensely – 'from early childhood I went through everything with them'. She was away from school for a period during this time and became 'very depressive'.

[96] The Marxes treated her as though they cared for her, giving her a great deal of advice: and when she was unhappy or heart-sore, they would say to her: 'Come over to us. Come and visit us. Come and stay with us.' She described her bond with the couple as 'a relationship of trust, as though they were a mother and a father to me'.

[97] The appellant himself assured the complainant that she could trust him. He told her that if there was anything troubling her that she wished to talk about, she could feel entirely free to come and talk to him in confidence. Toward the end of her testimony she told the court:

'Johan Marx came and he made as though … I don't know if it was genuine or not, but interested in my schoolwork and what I was doing, in my friends. How I feel about certain things. And that I felt about him for his companionship, this is a person who is able to give love and attention to me, love in the sense of I care for you. And since I was repeatedly told, "I do care for you", and that is why I felt, not just for him, but for his wife, because my parents were quite self-engrossed (*heel op hulle eie*) and I yearned for a father figure I can almost say and I found this in Johan Marx in a certain way.'

Power relations and the quasi-family situation

[98] These elements of the complainant's account may be regarded as uncontested. They provide the setting in which the rest of her evidence, much of which was disputed, must be evaluated. For they necessitate two factual conclusions with their corollary:

a. First, when she met the Marxes in the winter of 1997 the complainant was a troubled, needful and unsettled teenager, searching for and in need of affection and attention. This made her susceptible to influence, pressure and

the exercise of power from those in a position of adult authority over her, and vulnerable to exploitation at the hands of an unscrupulous or predatory adult.

b. Second, although not bonded by blood or upbringing to the appellant and his wife, she became involved in a close association with them that was akin to a family relationship, in which they were the elders and she was the child. The High Court's finding that this 'was not far removed from a family situation', seems to me not only correct, but critical to a proper assessment of the evidentiary issues.

c. Because of the great discrepancy in their ages and her intrinsically subordinate position in this relationship, the complainant was particularly susceptible to the influence and authority and power of the elders in the relationship.

[99] These factors – the complainant's youth, needfulness and vulnerability, on the one hand; and the situation of quasi-familial trust, authority and subordination in which she found herself, on the other – cast light on the rest of her evidence. In particular, they illuminate the central issue on appeal, namely whether it was proved beyond reasonable doubt that the appellant sexually assaulted and raped the complainant in the home environment, even though thereafter she continued to pursue familial relations with the Marxes as a family, and a quasi-consensual sexual relationship with the appellant himself.

[100] Streicher JA is sceptical about the rapidity and intensity of the complainant's affection for and dependence on Mrs Marx (by which she explained her reluctance to denounce the appellant at or immediately after the

first sexual intrusion, three months after she met the Marxes, as well her persisting presence in the household). Nugent JA regards this bond as a tenuous explanation for the complainant's subsequent conduct. With respect, this does not seem to me to show sufficient understanding of the bond-formation patterns of troubled, needful, distressed and lonely teenagers (not to speak of adults). It seems to me entirely credible that a young girl, in need of attention, could form such an intense relationship in such a short time, and persist in finding it valuable despite the imposition on it of an initially non-consensual sexual relationship. Indeed, it was the complainant's very susceptibility that explains the appellant's later ability to manipulate and abuse her for his ends.

The indecent assault and the rape

[101] According to the complainant's evidence, some months after she became involved with the family, in the September school holiday of 1997, it became plain that the appellant's intentions were by no means purely parental or altruistic. It started with inappropriate touching and with conversations that left her feeling uncomfortable. He would for instance say, 'Yes, my wife will be going to the shop shortly, then you and I will be alone.' To the adult eye and in retrospect (the complainant testified shortly after she turned 21), the insalubrious insinuation is plain: to the vulnerable teenager of half a decade earlier it must have been confusing and unsettling, if not bewildering.

[102] She accompanied him on a shopping trip during which he inquired extensively about her personal relationships. She was not interested in sexual relations with men, and maintained her limits. She felt interest in certain boys,

but would not allow herself to be pressured into doing things she didn't want. The appellant remarked on this, but then added: 'A man is going to come who will be able to soften you up.' She testified that she did not quite know what he meant, but felt uncomfortable, because of the very personal nature of his questions.

[103] He became 'vatterig', inclined to inappropriate physical touching. He would put his hand around her body to touch her stomach. She resisted such intrusions by swatting his hand away and saying 'No'. If she was sitting at a table he would come and put his hand over her shoulder to try to touch her breasts. She resisted by protesting or by getting up and leaving the room. Initially he accepted her refusal and would leave her.

'He would for instance do it in passing, walking past in a passage or where he knows I'm standing alone in a room. And if I said to him, No, don't, then he turned around and walked away.'

[104] But he continued trying. And grew more persistent – always when his wife was not in the vicinity. This in the midst of a situation whose atmosphere of predatory ambiguity the complainant described thus: 'After all it isn't always that he definitely did it' (*dit is mos nie altyd dat hy dit definitief doen nie*). He would want to kiss her the neck. Later he started touching her breasts. She showed her dislike. How, she was asked in cross-examination? She replied, By slapping his hand away and saying 'No, don't, I don't like it.'

'And then did he take his hand away? – Yes. But then he comes back and tries it again.'

[105] When she told him not to touch her, he would react by ignoring her, by not speaking to her, by treating her as though she was not there. But, she was challenged, was this not what you wanted? Her reply depicted the conflict the situation created (and was undoubtedly designed to create) for her:

'Yes, it [was]. But it felt to me he also said he is for me … he wants to be there for my problems, for friendship. I must be able to trust him. Now, why, I care for them, I became fond of them all, why does he do it? Why does he want it from me, if he says that I can trust him as a friend.'

[106] When pressed as to whether it troubled her when the appellant ignored her, she depicted the distress that his profession of disinterested commitment, in contradistinction to his intrusive touching and emotional blackmail, caused her:

'It wasn't nice, yes, because in the first place, they are my friends. Now just because I say to him, "Don't touch me", why does he ignore me? Why does he seek such things from me and then ignore me? Then he isn't honest when he says that they want to be my friends and be there for me. That is what troubled me, not the fact that he ignored me, but because of the intentions that he had.'

[107] No doubt it would have been judicious for the complainant at this early stage already to have taken recourse, as her cross-examiner suggested in the context of the later grosser violations, to Child Line or Rape Crisis. But this is to view the situation with adult dispassion, when the victim was still a child: a needful and vulnerable child, who was being manipulated by an adult perpetrator whom she described as deliberately withholding attention when she resisted his intrusions.

[108] And it is to miss the very point the complainant's evidence vividly evoked – that she was entangled in a web of rewards and punishments at the hands of an elder whose intrusive conduct became increasingly difficult to resist. The very complexity of the situation lay in the fact that the comforts and rewards it offered – the attention and love she craved – were given subject to a sinister overlay of mounting sexual intrusion. For later, as she testified, 'it came to the point that he touched and did not really bother himself with what I said' (*maar later het dit gegaan dat hy vat en hom nie juis steur aan wat ek sê nie*).

[109] It is in this context that the complainant's evidence regarding the charge of indecent assault should be assessed. She testified that the first occasion of unwanted genital touching occurred in the marital bed. The complainant explained that at the instance of both spouses she would often join them there to watch videos. One Saturday night in the school vacation of September 1997, after the couple returned from their outing, his wife invited her to watch the movie. She was already in her pyjamas. The two, woman and girl, were sitting on the bed when the appellant entered. He insisted the complainant shift over to secure for himself a place in the middle under the bedcovers. He was inebriated. After a while he suggested that his wife go and shower in the bathroom, which adjoined beyond a walk-through dressing-room. He then used the opportunity of her absence to place his hand in the complainant's pyjama pants.

[110] She said, No, and tried tugging at his hand; but he replied, 'Man, just wait' (*man, wag nou*). The more she asked him to stop he said, 'Just wait a bit' (*wag net gou*). He then came closer and inserted his finger into her vagina. She

tried to stop him but couldn't, and tried to get up but likewise couldn't. When she told him to stop, he just told her to shush, be quieter, because his wife was nearby. When he heard his wife returning from the bathroom he removed his finger and made as though nothing had happened.

[111] She was asked in cross-examination why she did not leave the room when his wife went to the bathroom – since she ought to have anticipated that he would try to meddle with her. She replied that the nature and extent of his invasive conduct was unexpected:

'The bathroom door was ajar. I did not think that he would stoop so low as to do that to me while his wife was in the next room.'

[112] When asked during evidence in chief why she did not immediately report what had happened to his wife when she returned, the complainant explained that she felt constrained by attachment to his wife, and by fear for the consequences for her and the children:

'I was very fond of his wife and didn't want to lose her as a friend or as a person to whom I could go. Also not lose her trust and confidence (*vertroue*). I did not want to lose her as a person. And I was scared that if I said something, she would not believe me and choose her husband's part and then what becomes of me. Then … I don't have tannie Lettie any more.'

[113] Later she explained, I didn't want her to know, because if I lose her, then what do I have? (*omdat ek …en ek wou nie hê sy moet weet nie, want as ek haar gaan verloor, wat het ek dan*).

[114] She added that she also thought of the children –

'because I love Lise-Ann and Herman very much. And I did not want to hurt them by also putting their parents through the process of there being problems that perhaps might cause

them to separate. I wanted to avoid everyone getting hurt, so that I rather carry the hurt on myself'.

[115] In cross-examination she confirmed her worry that his wife might overhear any protest on her part:

'I tried to make him stop, but he wouldn't. And if I jump up at that point and scream, then his wife would ask, what's going on. What's the problem. I didn't want his wife to think badly or poorly of me in any way or know what her husband is doing, because then, I also thought of the children and of her. I would do anything to protect them.'

[116] Some of this no doubt occurred to the complainant in articulated form only afterwards, as her cross-examiner suggested, and some of it was surely also clarified for her in the psychotherapeutic and psychiatric processes she later underwent. But what her evidence depicted with incontrovertible clarity is that the appellant's hand in her pyjama pants placed her in a compromising situation, since it relied on the very proximity of his wife to ensure her compliance.

[117] The view that non-consensual fondling while Mrs Marx was near is improbable in my view overlooks that this was an integral part of the appellant's method: it was his wife's very proximity that assisted him in imposing on the complainant the situation of compromise, embarrassment, shame and resultant complicity that ensured her silence. It is of course paradoxical that he ensured at other times that his wife was not in the vicinity: the point is that by both means he succeeded in contriving concealment from her.

[118] More importantly, like the intrusive talk and touching that preceded it, his conduct placed the complainant in a position of semi-complicity. It is evident

that he relied precisely on her awareness that what was happening was inappropriate, and drew her into an increasing sense of guilt and mutual responsibility for it. This sense of shared responsibility – however unjust and illusory – was what enabled the appellant to exact compliance with the deed while ensuring the complainant's subsequent silence.

[119] Later she explained in relation to a similar incident that 'He always put me in a position [or] situation where I couldn't really get away.' It was the proximity of his wife in the adjoining room that placed the complainant in a position where she 'couldn't really get away'. Far from impeaching her insistence that the intrusion was not consensual, it formed an indispensable part of the circumstances that made it possible.

[120] To expect of her, in this setting, to denounce him to his wife by immediate outburst or subsequent confession expects of the complainant a level of maturity and self-possession that she lacked. It shows insufficient appreciation of her youth, of her vulnerability, and of the impact of the quasi-parental power the appellant as a much older adult male exercised over her. Most importantly, it ignores the guilty complicity in which his violative conduct was designed to entrap her (*wag net*; *sjuut*; *wees sagter*).

[121] This was the pattern of the later similar unwanted genital touching the complainant described. On these subsequent occasions Mrs Marx was not in the bathroom, but in the bed itself, snuggled in (*ingekruip*) on the other side of her husband. He would, the complainant said, contrive the situation by encouraging her to get onto the bed, or by getting his wife to invite her if she declined. Then

he would ‘worm himself’ in under the bedclothes (*inwurm*) while he fondled her under the covers.

[122] The intrusions increased in their range. From touching her genitals, he moved to touching her breasts and then to placing her hand on his penis (from which she said she always withdrew). The complainant testified that he would position himself with his back to his wife so that she would be unaware of what was happening.

> ‘So, one night it was this, another night just that. Later he eventually behaved in such a way that everything then happened.’

[123] Shortly after the first incident, on 9 October 1997, the complainant turned sixteen. The day was coincidentally also the appellant’s birthday. She arrived at the house on her bicycle. He later touched her and kissed her to ‘congratulate’ her ‘for her birthday’. But it was more than just a kiss, a normal kiss for one’s birthday. In giving her a ‘birthday hug’, he managed to touch her breasts as well.

[124] In December 1997, as the Marxes were departing on holiday, the complainant brought gifts for the appellant’s wife and the children. Thinking him out because the car he normally used was not outside, she entered. Hearing water from the shower, she announced herself. He called to assure her that his wife would shortly return. She waited in the study. He entered in a pair of short pants and wanted her to touch his genitals. He pressed her against the wall and rubbed himself against her. He asked her whether he couldn't ‘just moisten the little tip’ (*kan hy nie net puntjie natmaak nie*). She said, No, what are you talking about? He replied, ‘Oh, man, just moistening the little tip, just quickly

moistening the tip'. She said, No. He then kissed her on the neck, and rubbed his penis against her. When his wife arrived he hastened to the bedroom, returning later as if nothing had happened.

[125] On 1 January 1998, when the Marxes returned from vacation, he insisted that the complainant had not yet greeted him, and wanted to kiss him. She said, No. When he tried to persuade her, she repeated her refusal. That month she assisted the family with its move from O'Kennedyville, where they were living, to their new home in Pioneer St, Durbanville. On 31 January, the day of their move, her uncle and aunt and cousin were killed in a motor accident.

[126] The complainant had turned sixteen and was now in standard nine (grade 11). It was during this time that the appellant began what from her evidence can best be described as a quasi-seduction. In the period January to March 1998, she said, he began more or less coaxing or cajoling her, fawning over her (*pamperlang*), about having sexual relations with men. And the more she said, No, she didn't believe in it, the more he tried to soften her up and convince her that it was not a big issue or a problem, that it happened quite generally.

[127] The complainant testified later that at that stage she was not knowledgeable about relationships or sexual relations and about what happened when you had sex and how it worked. He told her that he wanted to teach her all those things about life, because she didn't know them and he wanted to raise her for himself (*hy wil vir my al daai dinge in die lewe leer, want ek weet dit nie en hy wil my leer van al die tipe dinge en hy wil my grootmaak vir hom*).

[128] She testified that the appellant made increasingly explicit and suggestive remarks to her. Often if she was standing against a cupboard or in a corner, he would come from behind and make movements against her. He whispered in her ear, 'I'm feeling like a nice poke now' (*ek is nou lus vir 'n lekker steek*). He said, 'You know, if I weren't your father's friend, I would have poked you long ago' (*weet jy, as ek nie jou pa se vriend was nie, het ek jou al lankal gesteek*). Other times he would say, 'I want to poke you so that you scream from pleasure and that you just want more and more' (*ek is lus om jou te steek dat jy skreeu van die lekkerkry en dat jy net meer en meer wil hê*).

[129] The complainant's evidence established that the appellant entrapped her in a quasi-seduction in the domestic environment: the compromise, complicity and conflicting obligation the situation created impeded extrication or denunciation. The critical elements as revealed in her testimony are that the appellant mounted a seductive campaign that –

a. exploited her subordinate and dependent position in his household;
b. capitalised on her need for attention, affection and solace; and, most importantly,
c. drew her into a complicit and guilty silence that his first suggestive comments and ambiguous touching had begun to create months before.

[130] The quasi-seduction had a culmination of sorts on 31 March 1998 when the first intercourse took place. Mrs Marx was out. According to the complainant, she was in the office (which was in the garage adjoining the house) doing tasks Mrs Marx had assigned to her. These included attending to the

telephones, which, she explained, was why she felt unable to leave after what then ensued. The appellant entered the room and rubbed himself against her, telling her that he wanted to 'poke' her. She said, No. He persisted. She again said, 'No, I don't want to. I've never done it. I'm scared.' He always told her that she wasn't a virgin, that she'd slept with her 'mates' (*hy het altyd vir my gesê, nee, ek is nie 'n maagd nie, ek het al met my pêlle geslaap*). (He also claimed, she testified, that her own father was having intercourse with her (*ja maar jou pa doen dit ook aan jou*.)

[131] He left the office and went to the bedroom. She continued with her work. She then heard him calling her from the passage, as he often did. She told him she was busy, but he called again. Assuming that he was summoning her to help him or to do something for him, she proceeded to the room. As she came down the passage, she saw him turning around the corner into the dressing room.

[132] My colleague Streicher JA concludes that it is 'highly improbable' that the complainant did not know when she proceeded to the room that the appellant planned to put into effect his wish to have intercourse with her, a view my colleague Nugent JA appears to share. This seems to me unfairly to impose on the complainant the wisdom of knowing what subsequently transpired. The appellant's suggestive conduct – wide, invasive and lewd – had been occurring over months. Only in retrospect can its continuation on that day signify any particular menace. In December already there had been 'puntjie natmaak', with much 'steek' talk thereafter. Why, on 31 March, should the complainant divine that this time his suggestive behaviour would have a more grossly invasive

physical product? The extent of the preceding conduct made it no more likely that on this occasion he would foist himself on her coitally.

[133] The complainant explained repeatedly in her testimony that the appellant often summonsed her to do things for him, to run and fetch and bring. There can be no doubt that she was by this stage deeply enmeshed as a subordinate familiar in the domesticities of the Marx household. She explained, for instance, that she helped with the ironing and with storing it, and that the appellant often asked her, for instance, to fetch sweatpants for him, or to find where she had put it; and that on this occasion she had no reason to be especially suspicious of his summons.

[134] The regional magistrate rightly believed her, as did the High Court. It is in my view not appropriate to invoke the benefit of retrospection and to demand of her a standard of adult wisdom and foresight that the situation did not demand and which she in any event plainly lacked.

[135] When, following him, she opened the dressing room doors, she saw him with his trousers down and his penis erect. He appeared to be putting on what she assumed was a condom. He said that he wanted to ‘poke’ her. She said, No, I'm not going to. She wanted to turn and leave but he took her by the arm and started kissing her. He loosened her pants. She said, No, don’t, please, I don’t want it (*nee, moenie, asseblief, ek wil dit nie hê nie*). He said, Man, it will be quick. She said, No, I don’t want to! He said to her, ‘But you do want to’. She replied, ‘No, I don’t and I'm scared.’

[136] He took her and laid her down on the floor: he did so gently so that she didn't fall (*hy het sag gewerk dat ek nie hard val nie*). His body was over hers. He pulled down her pants and began to move against her. He thrust into her. She said, It's sore. Please, stop! He carried on making up and down movements. She said to him, Please, stop, it's sore, I don't want it. He said to her, Wait, it's nearly over, it'll only hurt for a little while still. He made sounds and said, Wait, I'm nearly coming, just wait. He then told her that he had come. He withdrew. She got up and went to sit on the bed. Sitting down next to her, he showed her what the condom looked like, and tied a knot in it.

[137] The complainant testified that she got up and went to the other bathroom, where she realised that she was bleeding. She did not know that there was bleeding on losing virginity, and didn't know what was happening, or whether there was a problem. The appellant, who had departed, now returned. She told him she was scared: she feared that something had gone wrong: she was bleeding. Leaning against the doorframe, he told her, Man, you must grow up for a change. He kissed her on the forehead and told her that nothing was wrong. He then left.

[138] She testified that she did not really know what had happened with her on that first occasion, and tried to read up about the process in a medical book her mother had at home. She avoided the Marxes for a while, and neglected to phone 'die tannie' as she usually did every week. Instead, Mrs Marx then called her, and asked her to come over:

'Because often she is alone during the day, then she just says, "Come and visit me", and then I went, because as I've said, I love her and the children very, very much. And I wanted to be with them, though not with Johan Marx. And even though I was scared of him, I always went back, because I had guilty feelings toward her, after what happened, but also because it was nice for me to be with her and because she was as a friend to me.'

[139] She testified that the appellant had intercourse with her over a dozen times more. On the first half-dozen or so occasions she told him that she didn't want to, but he took what he wanted nevertheless. When asked in evidence in chief whether she ever consented, she stated that after a year and a half 'there was no more chance for me to say no or yes. It just happened' (*dit het net gebeur*):

'He just accepted that it was happening and as he let me understand, this was a relationship that was between him and me. And that it was right to do this.'

[140] She stated that she controverted his explanation, but that it didn't help for her to argue with him. The first few times she said no, but later she couldn't any more. She explained that she couldn't resist him anymore. He took the opportunity to have intercourse with her whenever he could, always when his wife was away. She explained that she threw [resistance and refusal] overboard: he had injured her and taken from her what he wanted. So it no longer mattered to her, she just let it ride (*ek het oorboord gegooi, dit het nie meer vir my saak gemaak nie. Hy het my al klaar te ver seergemaak en klaar gevat wat hy wou hê … so, ek het dit maar net laat gaan*). The last half-dozen occasions of intercourse she acknowledged occurred with her consent as described. On these occasions she did not say No. She no longer cared what happened to her.

[141] The last occasion on which they had intercourse was eighteen months after the first. It was on her 18th birthday in October 1999, shortly before the matriculation examination and after the farewell function. During this time, she testified, she was in a state of severe mental distress as a result of the interaction with the appellant. She went to the Marxes to return the jewellery Mrs Marx had lent her for the dance, and to show her the photographs. Her mother dropped her off. Before her mother was to fetch her again, Mrs Marx had to depart quite suddenly for Paarl, leaving her alone with the appellant. On this occasion, they had intercourse without a condom. On previous occasions when he had not used a condom, he had withdrawn before ejaculating. Now he did not. He told her it was his birthday gift to her.

[142] Even though she had been taking contraceptive medication for a skin condition (which the appellant knew), she was overcome with anxiety that she would fall pregnant. On a school-end visit to her aunt, Mrs Henrietta van Rooyen ('tannie Thia'), in Plettenberg Bay, after two weeks and after some circumlocution she eventually confided in her that she had been having what she described as a 'relationship' with an older man, and that she feared she was pregnant.

[143] To her relief they ascertained that she was not: but she told her aunt of 'the whole situation': 'I told her it was a relationship. Then she asked me everything that happened' (*ek het vir haar gesê dit is 'n verhouding. Toe vra sy vir my alles wat gebeur het*). She told her aunt that the first time she had said No, but that later she did not resist. Her aunt thereupon told her that what had

happened was not a relationship, but in fact sexual molestation and rape. Her aunt told her that in her own best interests she would have to take it up with someone at some time. But fearing the appellant's power, and threats he had made against her and her parents, she felt that she could not.

[144] She begged her aunt not to her tell her parents – she wanted, eventually, to tell them herself: if it had to emerge, she wished to tell them herself (*as dit moet uitkom, sal ek dit doen*). In the meantime, although she saw them briefly in Knysna during this period, she decided to sever her bonds with the Marxes, initially by remaining in Plettenberg Bay, thus avoiding hurt to Mrs Marx and the children. (Her plans in fact changed and she returned in January to study.)

[145] Fairly early in the new year she met Morné Stander, to whom she became engaged in July 2000, and whom she married fourteen months later. A few months after she met him, she gained the confidence to confide in him. They decided to pay a visit to the appellant. When Morné went to the bathroom, the complainant told the appellant that he, Morné, would ensure that she brought the truth to light (*Morné weet en Morné gaan sorg dat ek die waarheid uitbring*). The appellant's response was that it was her word against his: he would say nothing had happened.

[146] Morné also encouraged her to tell her parents, which after considerable agonising she managed to do. She stated that this occurred in May 2000, though other passages in her evidence suggest that it occurred later.

[147] In the meanwhile, the complainant testified, she had been suffering severe symptoms of psychological distress because of the situation with the appellant.

In the course of the ‘relationship’ with him, she tried to commit suicide and was twice admitted to hospital. A psychologist, Bennie Marais, treated her for a ‘major depressive episode’ and panic attacks shortly before her school-leaving examination in November 1999. She did not tell him about the ‘relationship’. In February 2000 she saw Marais again, without mentioning the matter.

[148] Between 20 March and 20 May 2000, she saw a psychiatrist, Dr Sandra Swart, who admitted her to the Libertas hospital for panic attacks. In cross-examination the complainant was taxed with a letter from Dr Swart, which records that she did not respond adequately to appropriate medication, but that Dr Swart had not been aware of the rapes. In September 2000, after her engagement to Mornè, having been hospitalised again, the complainant started seeing a psychiatrist, Dr Willem Johannes van Rooy. To him she told the full story.

[149] On 23 October 2000, after being sent from Bellville police station to Parow and thence to Durbanville, she eventually managed to lay a complaint with Inspector le Roux of the Durbanville South African Police Services. She gave him a full statement. The appellant was arrested in May 2001. His trial commenced in October 2002. In the meantime the complainant’s [step-] father had on 31 May 2002 committed suicide.

[150] The complainant explained that she eventually confronted the appellant because despite her efforts she was not able to deal with what had happened on her own and within herself: ‘I was too weak, my body gave in, I couldn't last any more’. Her panic attacks and nightmares became so severe that she realised

that, despite the appellant's warning that she would be disbelieved, and his threats to involve her parents, confrontation was the only way forward (*die enigste uitweg*):

'I started getting more and more sick. My panic attacks increased. My nightmares would not stop. And the doctors gave me advice and I spoke to my husband and the best advice that was given to me was, to report the case, so that it can finally be dealt with and so that, whatever should happen, that I can live with it and go forward with my life.'

The evidence of the three further state witnesses

[151] In addition to the complainant, the state called three witnesses: her aunt, Mrs van Rooyen, her mother, Mrs Brenda Catherine Douglas, and the psychiatrist who treated her in September 2000, Dr van Rooy. Streicher JA finds that Mrs van Rooyen and Dr van Rooy did not corroborate the complainant's account of what she told them, and holds this against the complainant in his assessment of her evidence. Nugent JA endorses this approach, which in my view does not have regard to the way in which the issues emerged in the course of the trial.

[152] To appreciate the issues canvassed in the evidence of the further state witnesses, it must be borne in mind what was in dispute at the close of the state's case. The appellant faced two charges – one of indecent assault, and one of rape. But each charge spanned a considerable period: the first from August 1997 to October 1999; the second, from March 1998 to October 1999.

[153] The appellant, who was defended by senior counsel, lodged an explanation of his plea of not guilty in terms of s 115 of the Criminal Procedure

Act 51 of 1977 (the Act). In this he admitted regarding the first charge that the complainant visited him and his family regularly 'during 1998 and 1999' and that 'during about July/August 1999 in the bedroom of my home in Pioneer St, Durbanville, I touched the complainant's upper thigh and private part and pushed my finger into her vagina'. This, he stated, occurred with the complainant's consent and was therefore not unlawful. It became clear during cross-examination that this admission referred to a single incident.

[154] On the rape charge he stated that he had sexual intercourse with the complainant on 9 October 1999 'with her consent and cooperation'. He agreed that the admissions contained in the s 115 statement be formally recorded against him in terms of s 220 of the Act.

[155] The complainant's evidence thereupon recounted repeated unwanted gropings as well as a number of occasions of non-consensual intercourse during the periods referred to in the charges, though it also reflected that later the sexual engagements occurred with her consent in the sense described.

[156] Cross-examined about the appellant's version of the occasion on which he admitted inserting his finger in her vagina, the complainant conceded an incident in the marital bed, with his wife apparently sleeping, where she placed her hand over his and pressed it, admitting that thereby she assisted him and invited him to go further. She acknowledged that on this occasion she experienced a form of sexual awakening: she 'got a feeling and it was the first time I felt it'. She was scared and uncertain, because she didn't want his wife to hear, 'but there was also a feeling' (*maar daar was ook 'n gevoel gewees*).

[157] Later, in answer to questions from the magistrate she underscored this: 'It was the first time that something like that had happened with me and it was a nice feeling. And I wanted it to stop, because his wife was next to me, but it was also a nice feeling. I tried to stop it. I grabbed his hand to stop him, but it was a nice feeling. … I cannot deny it, it was a nice feeling and it was the first time that I experienced it.'

[158] Regarding the appellant's version that the sexual intercourse on 9 October 1999 took place with her 'consent and cooperation', the complainant freely owned that by that stage there was no question of refusal or resistance on her part. She stated that, in contrast to earlier occasions on which she refused, 'I did have sexual intercourse with him on 9 October with my … with my consent'.

[159] At the end of the state case it was therefore common cause that on at least one occasion when the appellant touched her genitals – seemingly that mentioned in the plea explanation – it was with her consent, and that the intercourse on 9 October 1999 was also with her consent.

[160] What remained in issue was whether the sexual interaction was confined to these two occasions – as the appellant's plea explanation pre-figured – or whether over a prolonged period a series of sexual incidents took place, initially notwithstanding the complainant's refusal and against her will, albeit later with her submission and consent.

[161] What seems to have been implicit between state and defence after the complainant's evidence was that, if the state established on the basis of the complainant's evidence that a protracted series of sexual interactions took place,

a credibility finding in her favour on this issue would resolve the question of her initial consent. This does not of course follow as a matter of logic, but it does appear to account for the course the evidence of the subsequent state witnesses took, and for the form the magistrate's judgment took, to which both Streicher JA and Nugent JA allude. The focus on the sole question of the complainant's consent or lack of it on the occasion of the initial intercourse on 31 March 1998, and her subsequent conduct in relation to that issue, emerged only later, when the magistrate convicted the appellant of a single occasion of indecent assault and a single occasion of rape.

[162] It therefore seems wrong to read the evidence of the state witnesses who followed the complainant as though the issues in court then were those that crystallised later. This appears to cast light not only on the evidence that Mrs van Rooyen volunteered, but the questions that both the state and defence counsel put to her. In particular it appears to explain the fact that defending counsel did not cross-examine Mrs van Rooyen at all as to whether the complainant reported to her that the first intercourse was without her consent.

[163] Mrs van Rooyen testified that the complainant arrived at her home in November 1999 in a highly emotional state, focused on her fear that she might be pregnant. After some encouragement and prodding, the complainant eventually told her what had happened to her (*en toe het Marlese vir my vertel wat gebeur het met haar*). Mrs van Rooyen explained that because of the complainant's enormous distress (*Marlese was verskriklik ontsteld*), which

included panic attacks during the visit, she did not ask her in detail what had happened.

[164] The prosecutor asked Mrs van Rooyen, What did she tell you? To this she responded, 'She told me that a man who was a good friend of her parents indecently groped her' (*sy het vir my vertel dat 'n man wat aan haar ouers goed bevriend was, vir haar onsedelik betas het*). The prosecutor invited her to continue. She responded:

'She told me that he indecently groped her and so on and that she had been uncomfortable with the situation. And asked him to stop it. And that this didn't really make an impression. Marlese knew it was wrong. The person's wife is very well known to Marlese and she loves the wife and the children very much. Apparently she minded the children on a regular basis when the wife had to go and work.'

[165] The prosecutor then asked: Did she only say that she had been indecently groped or what did she say to you? Mrs van Rooyen responded:

'No, she told me that it was at the beginning that he only groped her and … obscenely groped her, but that later apparently it went over to the deed (*dit het later blykbaar tot die daad oorgegaan*). By this I mean that she said that he had sexual intercourse with her.'

[166] She was not asked to elaborate on this in her evidence in chief. Nor did the issue arise at all in her cross-examination. In questioning recorded over five pages of evidence, defending counsel did not once raise the question whether the absence of initial consent was reported to her. Instead, counsel focused solely on the extent of contact between the complainant and her aunt during the period covered by the indictment, and particularly on whether Mrs van Rooyen had

seen her before December 1999, and, if not, whether during this period they had spoken by telephone.

[167] Towards the end of cross-examination counsel articulated his interest expressly. He explained that he was trying to establish the complainant's relationship with the aunt, how she previously observed her: 'But if you did not see her in 1998 and 1999, then we are wasting each other's time.' From this it would seem that he did not put in issue the other aspects of the complainant's evidence in regard to which Mrs van Rooyen could have testified.

[168] This also explains the questions the magistrate then put to Mrs van Rooyen. 'I thought [defending counsel] would touch on this, [but] he didn't', he said: 'Let me ask it.' What he then inquired about was not whether the complainant had reported her lack of consent to the first intercourse – for that appears to have been taken for granted – but whether the complainant had reported to her aunt only one, or more than one, incident of sexual intercourse. Mrs van Rooyen confirmed the latter. In follow-up cross-examination she affirmed this.

[169] The suggestion that the intercourse on 31 March 1998 might have been consensual, or that the complainant did not, contrary to her testimony, report to her aunt that she had said No, does not seem to have arisen at all. The contrary seems to have been taken for granted. Certainly the defence did not expressly put in issue during the aunt's testimony the complainant's evidence that she told her aunt that the first occasions of intercourse (which the appellant of course denied entirely) were against her will.

[170] The magistrate seems to have accepted that the complainant might not have told her aunt in specific terms that she refused consent to the first intercourse, but then added: 'In any event I get the impression from Mrs van Rooyen's evidence that consent never occurred to her (*nooit in haar gemoed opgekom het*) in the conversation. It sounds rather as though she assumed as self-evident that consent was lacking.' This observation was in my view both astute and accurate.

[171] My reading of Mrs van Rooyen's evidence is that it was not merely obvious to her, as the magistrate found, but indeed implicit in her testimony, that the complainant had told her that both the first groping and the initial sexual intercourse were against her will: *tot die daad oorgegaan* is directly linked to *onsedelik betas*, which is directly related to the unavailing *gevra het om daarmee op te hou*.

[172] At all events, at worst for the state – on whom of course rested the onus of establishing the charges beyond reasonable doubt – and at best for the appellant, Mrs van Rooy's evidence was ambiguous, but could have been clarified by a single simple question: did the complainant tell you that she refused consent to the first intercourse? The state was disbarred from asking this, since it would have been impermissibly leading. Defending counsel – an experienced silk – either overlooked it, or chose not to ask it. This, it seems to me, was because the answer was both implicit and obvious.

[173] During argument, defending counsel indeed advanced an argument, with which the magistrate dealt, that the complainant had not specifically reported her

refusal to her aunt. But argument was on 11 December 2002, some seven weeks after the evidence was concluded on 16 October. By the latter date, as appears from the magistrate's judgment, the record had been typed. Counsel was of course free to advance any argument the record supported; but the course of the trial suggests that it was an afterthought.

[174] And even if counsel deliberately did not question the aunt on this point because he hoped to extract a tactical advantage from an ambiguity in her evidence, I do not believe that there was any warrant for him to have done so, or for it to be done now.

[175] The evidence of the complainant's mother did not contribute materially to the resolution of the factual disputes, except in the following respects. First, she confirmed the complainant's relative sexual naiveté before the relationship with the Marxes. Second, she corroborated the domestic difficulties the complainant experienced during her adolescence and during her involvement with the Marxes. Third, she specifically confirmed that the complainant's attachment to Mrs Marx was profound and strong (*'n besondere hegte band tussen hulle gewees, iets wat ek nie kon beskryf nie, wat vir my onmoontlik geklink het*).

[176] Fourth, the complainant's mother testified that the complainant reported to her that she had been 'molested' (gemolesteer) by the appellant. The word is significant in relation to the inferences my colleague Streicher draws from the testimony of Mrs van Rooyen and Dr van Rooy. It seems to indicate that a wide and encompassing language of sexual abuse (molestation) was used, in contrast to terms of more lawyerly precision. As with Mrs van Rooyen and Dr van Rooy

(to whom I return below), there was no question in the evidence of the mother that the complainant gave consent: the contrary was both implicit and obvious.

[177] Lastly, a confusion in the complainant's evidence – namely during which month in 2000 she informed her parents – was compounded when the mother testified that her daughter informed her in August 2000 – not in May, as the complainant testified, nor in or after September (to which I return later).

[178] It is against this background that the evidence also of Dr van Rooy, the last state witness, must be evaluated. He testified that he saw the complainant for seven or eight consultations between 13 September and 30 October 2000. She reported intimacy problems with her fiancé and that she couldn't trust any man. This eventually led to her admitting to Dr van Rooy 'that she was sexually molested from a young age', and that this consisted both in her being groped and that penetration had also taken place (*dat sy beide betas is en dat daar penetrasie ook plaasgevind het*); and that this happened before the age of 16: 'she couldn't give me a precise age when it happened for the first time'. (During her evidence the complainant stated that she told Dr van Rooy everything after he realised that 'there was a hidden agenda behind me' – *hy [het] agtergekom daar is 'n verskuilde agenda agter my*).

[179] In cross-examination it emerged that Dr van Rooy's notes recorded the following: 'Sexually molested by parent's house-friend'. These notes also recorded that she told her aunt in December 1999, as well as her fiancé, two weeks before seeing Dr van Rooy. He proceeded (apparently rendering his notes): 'She referred to a business friend of her father who sexually molested her

and mentioned that the extent of it was groping (*betasting*) and penetration and that it was influencing her sexual relationship with her fiancé.'

[180] Dr van Rooy added that he had not made a note that the penetration occurred before the age of 16, but that that is what he had understood. Thereupon, he testified, he informed the complainant 'that it is basically statutory rape if someone under the age of 16 should have sexual intercourse with a female person'.

[181] 'Sexual molestation' that embraced penetration in a psychiatrist's consultation points strongly, if not ineluctably, to an assumed absence of consent. Indeed, the question whether the complainant expressly told Dr van Rooy that she had initially refused consent to intercourse did not specifically arise. Nor was the question put by either counsel on either side, or by the magistrate. Defending counsel's interest appears to have been principally to establish a contradiction with the complainant's evidence in relation to her age at first intercourse as reported to the doctor. (In her evidence it had been clarified, after she initially testified to the contrary, that she had in fact already turned 16 when, on her version, the first intercourse occurred.)

[182] It is important in this respect that even at trial the complainant herself showed quite a measure of uncertainty about precisely how old she was at material stages of the violation. She stated at one point that the intercourse occurred over a two and a half year period, but accepted correction from the cross-examiner. Immediately thereafter she testified twice that she was fifteen at the first intercourse. She said '1998 I was in standard 7, I was 15. 31 March I

was 15.' The cross-examiner carefully took her through her birthdays, after which she readily conceded with an apology that she was already sixteen at first intercourse (*ekskuus, my datums … ja*). But then she went on to express the view that under-age sex was prohibited until eighteen.

[183] It is significant, as pointed out earlier, that her mother testified that the complainant reported to her, after speaking with Mornè (seemingly before the consultation with van Rooy, though as mentioned this is not clear) that she had been 'molested' (*gemolesteer*).

[184] Consent is no defence to a charge of under-age sex. Hence, once Dr van Rooy formed the impression that the first intercourse occurred before the complainant turned 16, the matter of express refusal would not have been significant to him. This appears to be another reason why the question was simply not raised with him during his evidence.

[185] I therefore respectfully differ from my colleagues' conclusion that the evidence of either Mrs van Rooyen or Dr van Rooy is at odds with that of the complainant. In my view, her evidence that she informed both of them of the non-consensual nature of the sexual interaction the appellant initiated should be accepted. The narrow focus on the sole question of consent on 31 March 1998 emerged only later, and it would be an error to make unjustified deductions from the conduct of a trial in which the issue had not yet crystallised in that form.

The appellant's evidence

[186] The appellant testified, in accordance with his plea explanation, that only two incidents of sexual intimacy occurred. Though he depicted the complainant

as a petulant, attention-seeking adolescent who thrust herself upon him, he did not seek to controvert the main elements of her account of the progression and intensity of her relationship with his family. In fact, of the complainant's relationship with his wife, he volunteered that it was 'brilliant'. Somewhat tellingly, at one point in his evidence he referred to her as 'die kind' (the child).

The magistrate's judgment

[187] Nearly six months after evidence and argument were concluded, on 2 May 2003, the regional magistrate, Mr E Louw, delivered a 65-page judgment, in which he exhaustively set out and analysed the evidence. He stated that the appellant delivered his evidence in a 'fairly satisfactory manner' (*lewer heel bevredigend sy getuienis*) and that, broadly seen, there was not much criticism to be levelled against his evidence or the manner in which he conveyed it. However, viewed in more detail, he considered that criticism did emerge.

[188] Having examined in detail the contradictions and discrepancies in the complainant's evidence, the magistrate concluded:

'The complainant's evidence is too detailed to be fabricated. That possibility simply doesn't exist. There is no reason why she should figment or fabricate the case against the accused. Although complainant's evidence is susceptible to criticism, there is not sufficient reason to reject her evidence in totality. Note, it is emphasised here that it is not being said that the complainant's evidence is without fault or criticism. The question is rather whether the inconsistencies, deviations and improbabilities in complainant's evidence should have a destructive effect on the State's case. For the reasons referred to above judged in totality, I am of opinion that this should not be the case. On the other hand there is also not really much that can be brought in against the accused's version, except for a few improbabilities and

deviations to a lesser extent. Standing alone his evidence is convincing, but in the totality of the evidence the single-standing conviction of his evidence is crystallised out.'

[189] The magistrate at this stage pointedly alerted himself to the proper approach to assessing whether the state's case has been proved beyond reasonable doubt when measured against an accused's conflicting version. He quoted from *S v Mbuli* 2003 (1) SACR 97 (SCA) at 110 and *S v Chabalala* 2003 (1) SACR 134 (SCA). These cases in turn refer to *S v van Aswegen* 2001 (2) SACR 97 (SCA), in which the strictures against 'compartmentalisation' of evidentiary considerations expressed in *S v van Tellingen* 1992 (2) SACR 104 (C) and *S v van der Meyden* 1999 (2) SA 79 (W) were endorsed. The point is that the totality of the evidence must be measured, not in isolation, but by assessing properly whether in the light of the inherent strengths, weaknesses, probabilities and improbabilities on both sides the balance weighs so heavily in favour of the state that any reasonable doubt about the accused's guilt is excluded.

[190] This is what the magistrate proceeded to do:

'Superficially considered we here have to do with a case where there not much of a difference in choice exists between the accused's and the complainant's respective cases. But scrutinised from closer under the magnifying glass, when the merits of the state case are weighed against and compared with the merits of the defence case, then the state case stands so much stronger and so much higher above the defence case that the power of conviction it embodies and exhibits becomes compelling. The evidentiary power of the state case stands unimpeached and unimpaired and strong in the face of a full-scale assault from the accused's

version, to such an extent that the court cannot find that the accused's version can be reasonably possibly true.'

[191] In my respectful view the suggestion that the magistrate misdirected himself in his basic approach to the evidence is not justified.

[192] After the appellant's conviction on both counts 'as charged', the applicability of the minimum sentencing legislation (Criminal Law Amendment Act 105 of 1997) arose. The magistrate delivered a further judgment making it clear, by reference to his earlier judgment, that he had found the appellant guilty on the basis of a single incident of rape (and seemingly also one instance of indecent assault). It is in these circumstances that the focus regarding the complainant's evidence seems to have shifted exclusively to the question whether the state proved beyond reasonable doubt that she withheld consent on the first occasion of genital touching and on the first occasion of intercourse on 31 March 1998.

[193] In assessing the credibility of the complainant, the magistrate, who saw her testify over two days in the witness stand (14 and 15 October 2002), gave thorough consideration to the aspects of her evidence that were susceptible to criticism. He concluded:

'Seen broadly and with the exception of the negative aspects of her evidence, the court experienced her as a brilliant witness. Sometimes she gave answers in cross-examination that surprised the court and that I didn't think would issue from her mouth. She gave relevant answers. She was straight and direct without prevarication (*sonder om doekies om te draai*). She did not hesitate to give the accused any benefit where it was necessary.'

The High Court judgment

[194] In confirming the magistrate's findings, the High Court did not merely apply the well-known approach to trial-court findings of fact and credibility this court enunciated in *R v Dhlumayo* 1948 (2) SA 677 (A) 705-706. The *Dhlumayo* approach emphasises the trial court's advantages in seeing and hearing the witnesses: but it is really 'no more than a common sense recognition of the essential advantages which the trial judge has had, as a consequence of which the right of the appellate court to come to its own conclusions on matters of fact, free and unrestricted on legal theory, is necessarily in practice limited' (per Davis AJA, Greenberg JA concurring, at 696).

[195] Thring J went beyond *Dhlumayo*. On his own reading of the record, he independently endorsed the magistrate's credibility findings. He recorded that he could 'find no fault with the manner in which the magistrate analysed and evaluated' the complainant's evidence: 'he did it in a balanced and just manner'. He added that 'on reading the record the evidence of the complainant, in my opinion, appears convincing. Her answers to questions are in all cases direct and unambiguous, and she at no stage during her long and exacting cross-examination tried to evade or elude any question. On the contrary she made various concessions in the appellant's favour where it would have been easy for her, if dishonest, not to do so. These concessions she made candidly and without circumlocution.' Later Thring J summarised thus:

'In conclusion this court is clearly of the opinion that the conviction of the appellant is justified on the evidence, and that there is no reason to deviate from the magistrate's findings or to meddle with them.'

Assessment of the state case

[196] It is in my view not hard to appreciate why the magistrate found that the complainant was a 'brilliant' witness, and why the High Court affirmed his conclusions. The complainant's evidence spans nearly 200 pages of typed record. She was subjected to cross-examination at the hands of senior counsel that was not merely rigorous, but gruelling, repetitive and (no doubt to some extent unavoidably) intrusive. She testified after surviving a psychological ordeal that included attempted suicide during the relationship with the appellant and hospitalisation for psychiatric reasons thereafter. The core of her story emerged quite unshaken: that though she had become entrapped in a long quasi-consensual sexual association with the appellant, she had said No on the first instance of genital touching and No again on the first occasion of sexual intercourse.

[197] She testified with dignity and candour about events that incontestably caused her great anguish. She sketched the interaction between her and the appellant in all its nuances – a complex narration of engagement, reliance, trust, intrusion, invasion, violation and betrayal. Twice in her evidence, dispassionately observed by the regional magistrate, she broke down: both times he judged her expressions of distress authentic, as indeed is manifest from the record.

[198] Why did she remain enmeshed? Her evidence portrayed with considerable power the subtle difficulties that arose when the appellant, in a situation of familial power and subordination, intruded on her integrity, imposed his will on her, and overbore her resistance. That situation necessarily entailed a position of compromise for her, since she was made a party, however unwillingly, not only to the sexual act, but to its subsequent concealment. Shame, guilt, fear and a sense of shared transgression were the result. The reasons that ensured her submission were also the reasons that secured her silence, and the very compromise in her position made her vulnerable to challenge when later she tried to hold the appellant to account.

[199] The complainant's testimony illustrates the assertions of improbability and implausibility that unavoidably attend a situation of this kind. At the time she thought that she had good reason for remaining silent. She feared disgrace, scandal, opprobrium, parental disgust, the fear of being disbelieved (constantly invoked by the appellant), and, she testified, the fear that the appellant would injure her parents in business or by exposing details of their past.

[200] Clearly she lacked the strength of will and courage needed to speak out earlier. Yet it is manifest from her evidence that she believed that the sexual violation that occurred at the start was negatived by her failure to resist effectively the appellant's gropings and his later insistence on full intercourse. She said that she had not wanted to hurt his wife, and was sure that it was she who would be considered the betrayer. She felt guilty for doing anything that might adversely affect Mrs Marx and the children. She wanted to be a part of

their family: yet by her failure effectively to resist the predations, and her consequent apparent complicity, she jeopardized what she most desired. With the benefit of adult dispassion this is all no doubt perfectly simple to divine.

[201] Yet the complainant's evidence powerfully portrayed the collusive relationship of shared guilt and secrecy that entrapped her. Her feelings of shame and complicity not only operated to secure her silence; in the chill atmosphere of judicial scrutiny, so essential a safeguard against false incrimination, they were difficult to articulate. Yet her evidence speaks eloquently of them.

[202] The notion of shared guilt and sexual and moral contamination, articulated more than once in the complainant's evidence, not only ensured silence; later, when the appellant was sought to be held to account, a failure to understand their coercive power should not result in unjust questioning of her credibility.

[203] The phenomenon of domestic sexual predation – of which this case, on any view, is a distressful example – requires like any other crime especial understanding, appropriate to its distinct characteristics. The domestic or familial predator's means are not violence or physical assault; his weapons not the knife or firearm; his means of subordination not the terror of the victim. He exploits the opportunities that intimate engagement offers, and the physical spaces the home affords, to prey upon his victim. And he uses the ties that bind him to her – often both emotional and material – to secure both compliance and concealment.

[204] When the victim is less than half his age, as here, and subject to his influence and authority as an elder, these factors operate with acute force. When she is a child craving affection and attention, as the complainant was, her peculiar susceptibility to abuse and exploitation must be appreciated to determine fairly and justly whether all the elements of her account are truthful, even if she failed to denounce him promptly or to remove herself from his proximity thereafter.

[205] The question in every criminal case is of course whether the state has proved beyond reasonable doubt that the sexual violation charged did occur. But failure to appreciate properly how feelings of guilt, complicity, fear and shame may in a domestic or familial situation operate to entrap a victim could lead to a failure of justice. In my respectful view this case offers a signal instance of that danger.

The conclusions of the majority

[206] My colleagues consider that the appeal should succeed, and that the appellant's conviction and sentence should be set aside. The appellant's version they cast aside as wholly improbable. But they take the view, for somewhat diverging reasons, that the complainant's account cannot be accepted.

[207] Streicher JA considers that the complainant's version is 'riddled with improbabilities'. Regarding the genital touching, he finds it 'somewhat improbable' that the appellant would grope the complainant against her will with his wife in an adjoining room with the door ajar, and even more improbable that the later more extensive groping would occur in the marital bed without the

complainant's consent. He states that the complainant could give no explanation for not simply walking away that first evening. Her conduct after the incident in conveying birthday greetings to the appellant without apparent resistance to his kissing her and touching her breasts lends support in his view to the inference of consent, as does her repeated return to the Marx household. He finds it implausible that after a few months the bond with Mrs Marx could have been so intense as to draw the complainant back.

[208] This seems to me to approach the evidence with insufficient appreciation of the semi-familial context in which the sexual violation took place. My colleague Nugent JA accepts the context, but rejects the complainant's account because like Streicher JA he considers that the other state witnesses did not corroborate the complainant, and because he considers that if she had been sexually assaulted against her will she would not persistently have allowed herself to be alone with the appellant thereafter. I respectfully differ from these conclusions.

[209] Regarding the alleged rape, Streicher JA, as mentioned, faults the magistrate for accepting the complainant's evidence that she did not know that the appellant proposed to have intercourse with her when she responded to his call from the passage. He finds that the fact that she entered the room through the closed doors casts doubt on her credibility, especially her evidence that she resisted his attempts to grope her. He finds further that her evidence does not square with that of her aunt Mrs van Rooyen, and that it is improbable that she told her aunt what she says she did. He also concludes that the complainant

never thought that what happened constituted rape, but that she was constrained to claim that she did so think because she realised that, if the intercourse occurred as she claimed, she probably would have thought that. He also rejects her evidence that she told Dr van Rooy that she refused consent.

[210] Streicher JA condemns the conduct of the appellant as 'a disgrace and morally reprehensible'. He finds that the complainant had reason to feel dirty and guilty, and to hold the appellant at least partially responsible for her feelings. He finds no reason to reject the complainant's evidence that the appellant was the dominant person in the relationship and concludes that the appellant abused his position and that his conduct was scandalous.

[211] He nevertheless finds that the complainant learnt only from Dr van Rooy that she had been raped; that it was the doctor's erroneous inference (derived from the wrong premise that she was under-age at the time) that triggered her revelation to her fiancé and her parents, which in turn led to her laying the charges against the appellant.

[212] These conclusions are in my view not justified. It is correct, as the magistrate emphasised, that there are contradictions and inconsistencies in the complainant's evidence. This is not surprising. She was testifying in October 2002 about events that started more than five years before, when she was not yet sixteen. She had in the meantime suffered acute psychological distress and been hospitalised repeatedly for it. From this she had emerged to relate a compound and nuanced account of domestic sexual predation and violation which at its core clearly and consistently reflected a refusal of consent to the initial sexual

acts. If her account had been free of inconsistencies and occasional contradictions, its authenticity may have been more difficult to credit.

[213] The question is what weight to accord these inconsistencies. I do not share my colleagues approach to the inconsistencies in the complainant's evidence. Some of apparent contradictions in my view derive from an unwarranted approach to potentially ambiguous evidence. Others are insubstantial, or immaterial, or both. In a number of instances, the conclusions adverse to the complainant are in my view based on a misunderstanding, or misinterpretation, of the evidence.

[214] Thus, Streicher JA states, regarding the first groping in the marital bed, that the complainant contradicted herself in claiming that she had 'pinched' her legs together (*toegeknyp*) in order to thwart the intrusion. This conclusion is in my view erroneous. The complainant was asked how the appellant managed to insert his finger into her vagina (*hoe het hy dit reggekry om sy vinger in u privaatdeel te steek*) against her will when they were both sitting against the head of the bed; did she cross her legs or press her legs together, for instance (*het u, u bene gekruis en u bene teen mekaar gedruk byvoorbeeld)*? In response she said:

> 'Yes, I was sitting, I pinched closed and I took my hand and I tried to pull his hand out (*ja, ek het gesit, ek het toegeknyp en ek het my hand gevat en ek het sy hand probeer uittrek*). I was watching TV, it was unexpected, it is not as if I was sitting waiting for him to go and press his hand into my pyjamas (*broek*). Because I did not expect that such a thing would

happen to me. I had never experienced such a thing in my whole life. Here this great big man (*die grote man*) comes and does it.

Can I ask you, did you pinch your legs closed (*toegeknyp*) or not? – No. …'

[215] After an intervening question she was asked a second time (and later again) whether she 'pinched' her legs closed. She replied each time without hesitation and with perfect clarity that she did not.

[216] This context shows that on its first appearance 'toegeknyp' – not a word the cross-examiner used, but one the complainant introduced in response to his question – referred not to her legs, but to her vagina (*toegeknyp en … probeer uittrek*). The grammatical form of both 'toegeknyp' and 'uittrek' points to a single shared, though unstated, anatomical object, namely her vagina. Had her reply intended to refer to her legs she would have echoed the cross-examiner's words by using not only 'gekruis' or 'gedruk', but also 'bene' (legs).

[217] Significantly, the cross-examiner himself seems to have understood her response thus, for he then adopted her word 'toegeknyp', and shifted the inquiry to her legs: to which she unhesitatingly answered 'No'. The supposed contradiction therefore does not exist.

[218] This may seem a trivial instance. And indeed it is. Even if the complainant had meant to refer to her legs and not her vagina in her first mention of 'toeknyp', which is improbable, her immediate clarification thereafter that she did not pinch them closed would surely more than adequately mitigate what was in all likelihood an inadvertent error of initial recollection. Indeed, the immediate correction would redound to her credit.

[219] My colleague Streicher JA considers the 'toegeknyp' issue important enough to mention it no fewer than three times. In my respectful view this illustrates a general approach to the complainant's evidence which is not justified.

[220] Thus, too, he mentions twice and counts against the complainant her apparent absence of resistance to the appellant's intrusive kiss and fondling on her sixteenth birthday. In my view it is manifest from the context of her narration that she was describing all the intrusions at that stage as unwanted. Indeed, she demonstrated in the witness stand how his touching her breasts on that occasion was supposedly incidental to what he proffered as a birthday hug. To require of her in this situation of ambiguous violation (*dit is mos nie altyd dat hy dit definitief doen nie*) to articulate her disaffection seems to me not only unfair to her as a witness but to miss the point of the means the sexual predator was employing.

[221] Thus, again, Streicher JA cites against the complainant, as an instance of her adapting her evidence to her own advantage and to the detriment of the appellant, that 'she testified that she hated the appellant, only to say thereafter that she has found her God and forgiven' him. With respect, this is not a just representation of what she said. She referred three times to her Christian convictions – once in her evidence in chief and twice in cross-examination. Each time it was in the context of acknowledging the embitterment and hatred that at one stage she had felt toward the appellant. 'I lost my respect for him', she said in evidence in chief. 'I was hurting, I was filled with hate (*hatig*) toward him.' In

cross-examination it was she who volunteered that she wanted to confront the appellant in 2000 because 'I was bitter within', and because she wished him to share the fear and suffering she had experienced. She affirmed when the cross-examiner took this up that she had wanted to get at him (*u wou hom bykom? – ja*). All this referred to her previous feelings.

[222] Streicher JA quotes an excerpt from the evidence in which the complainant uses the present tense (*ek is hatig*). With respect, his understanding of the extract is mistaken. This emerges a few lines later when the cross-examiner himself also uses the present tense, though he too is clearly referring to the past (*u is hatig teen hom, maar terselfdertyd voel u, u is in 'n verhouding met hom*). The context as a whole leaves no doubt that she was referring, and was rightly understood by her questioner to be referring, to her feelings of resentment and bitterness toward the appellant at an earlier stage during their 'relationship', and not when she was testifying.

[223] It is in this context not difficult to appreciate why Davis AJA and countless other judges of this court have placed a premium on the presiding judicial officer's first-hand assessment of the proceedings and of the credibility of the witnesses.

[224] At the end of her cross-examination it was at last put to her, as the sole motive advanced for falsely incriminating the appellant, that she still hated him and would do all in her power to see him go down (*u haat hierdie man wat hier sit en u wil alles in u vermoë doen om hom te sien ondergaan*). In response, she asked the magistrate whether she could say something 'personal', 'how I feel'.

The magistrate assured her she could. She then related the views that twice before she had adumbrated, namely that previously she had hated the appellant and had felt great bitterness toward him, but that in terms of her Christian faith she had now forgiven him.

[225] Her reasons for proceeding with the charges despite forgiveness she stated and re-stated with clarity and force: she wanted justice to be done; she wanted people to know what Johan Marx had done; and she wished to prevent his doing it again.

[226] Whatever the rationalist position on Christian forgiveness, it is on ancient authority quite possible, both doctrinally and logically, to forgive another at a spiritual level while wanting justice to be done in the temporal sphere. It is therefore incorrect to suggest that the complainant stated that she still hated the appellant while contradictorily claiming to have forgiven him.

[227] As is apparent, I differ from my colleagues also on other aspects of their approach to and assessment of the evidence, which seem to me to stem from insufficient appreciation of the particular quasi-familial setting of the crimes that were committed and from an unwarranted scepticism about the fundamentals of the situation the complainant's evidence depicted.

[228] Telling in this regard is the conclusion by both Streicher JA and Nugent JA that the complainant claimed that on the first occasion of intercourse the appellant physically overpowered her. This in my view is not correct. The complainant did testify, as my colleagues point out, that the appellant loosened her pants against her wishes and pulled down her pants and underclothes despite

resistance and that he arrested her intended departure by catching at her arm. But this does not constitute 'physical overpowering', and the complainant's evidence made it plain that she did not consider that physical force had been used. To suggest the contrary is to mistake the essential nature of the violation her evidence conveyed.

[229] In the complainant's evidence in chief there was no suggestion at all that she had been 'physically overpowered'. What she lucidly depicted was an attempt by a seducer to overcome by persuasion the reluctance of his children's teenage babysitter to agree to intercourse, and how he then went ahead despite her overt refusal. This was the culmination of a process of quasi-seduction that entrapped her in deeply compromising situations in which he fondled her in the marital bed and enswathed her in lewd expressions of his desires. To suggest that the situation involved physical force is to misunderstand its quintessentially emotional dynamic.

[230] In cross-examination the complainant explained that on entering the dressing room she was shocked to see him in the state she described (pants down, penis engorged, putting on a condom): 'I got a fright, I didn't know what to do. I just stood still there' (*ek het geskrik, ek het nie geweet wat om te doen. Ek het net daar vas gestaan*). She wanted to turn around and walk out, but he prevented her (*toe keer hy my*). He obstructed her exit and said, 'Don't go, take a look here' (*hy het my vasgekeer en vir my gesê ek moenie weggaan nie, kyk hierso*).

[231] At this point she performed a demonstration in the witness stand of how he grasped her. By omission of counsel and the magistrate this was not described for the record. It was at all events clear that no physical force was involved: for she explained that she meant 'grasp, because I should now look [at the condom]' (*om te vat, want ek moet nou kyk*). She agreed with the cross-examiner that he took her by the arm and prevented her from leaving: 'Yes, he took me so that I couldn't go. I must turn around and look at him, yes.' Still no physical force, but a physical intervention aimed at securing an opportunity to persuade her to stay: a seducer restraining his target.

[232] When he now told her again that he wanted to 'steek' her, she said, No, I don't want to; and then he urged her, 'But you do want to'. After she said, No, I don't want to and I'm scared, he laid her down, in a manner she was still demonstrating in the witness stand, and which her verbal testimony made clear was gentle (*hy het sag gewerk dat ek nie hard val nie*). She tried to keep her legs closed and said to him, No, don't do it. I don't want you to do it. He nevertheless penetrated her, thus completing the crime of rape.

[233] She reiterated that it was the appellant who prevented her from leaving, and that he held her by the hand. But she explained unambiguously: 'Not forced, but just so that I should stay with him' (*nie geforseer nie, maar net dat ek by hom moet bly*). When asked why she didn't walk away at the outset, she stated 'I am under his control, he held me fast. There is no chance for me to be able to get away' (*ek is onder sy beheer, hy het my vasgehou. daar is nie vir my 'n kans dat ek kan wegkom nie*). This suggests more physical coercion – but she

immediately clarified that in fact she made no attempt to get away (*het u inderdaad fisies probeer om weg te kom? – nee*). This interchange then followed:

> 'I ask the question again, did you physically try to get away – I tried, yes, but I couldn't.
>
> Now you're saying you did? – Tried, yes, but Johan Marx brought me back, held me back, I couldn't.
>
> Now, good. – As in running away, no, but to get away from him, yes. To get away from his distance, yes. But to run away I could not, because he was by my side.
>
> Miss, let us not put too fine a line on it. Did you try to get out of that room? – No.
>
> Why not? – I just tried to get away from him at first.
>
> Why did you not try to get away out of that room? – Because it was impossible for me to get out of his clutches.
>
> Good. In other words he held you and prevented you from leaving the room? Is that what you are saying? By holding you by the hand? – Yes.'

[234] The derisive tone of the cross-examiner, who had established to his satisfaction that no actual force – no physical overpowering – had been used, is plain ('By holding you by the hand?'). To read this evidence as though it relates a physical overpowering is in my view to mistake the essence of the violation that ensued. This emerged conclusively in later cross-examination, when the complainant was asked whether the intercourse of 31 March 1998 was forcible (*gewelddadig*). Encapsulating all the nuances that her previous testimony had sought to convey, she replied, In a way, yes (*op 'n manier, ja*). She was then asked in what way:

'The way he … I can always remember his eyes how he looked at me. The movements he made were a movement of, I want you, I have you, I take you, yes, that for me was forcible. The way in which he did it, he didn't care about how it felt for me, whether it was sore or uncomfortable, he wanted to do it.'

[235] The cross-examiner's suggestive invitation to claim that force was used gave her ample opportunity, if she believed that any element of physical coercion had been present, to say so. Yet she spoke only of her attacker's eyes and of his unfeeling manner. This is the essence of her account. To seek in it physical coercion is to misunderstand it, and hence to interpret her evidence in quite the wrong setting.

[236] It is in my view clear from her evidence as a whole that the complainant testified that no physical force was involved (*nie geforseer nie*). The 'clutches' (*kloue*) she referred to were emotional rather than physical, and the power exercised over her in the room was that of an adult predator who had entrapped her, not by force, but by complicity and guilt and collusive participation. This culminated, even as she remained physically free to depart, when he over-rode her clear and repeated No without the need to employ physical force at all.

[237] It surely needs no argument that our capacity for evidentiary appreciation should embrace situations that involve a sexual advance made upon a victim who may already be in a position of deep sexual, emotional and even physical compromise when sex is proposed. Such a position of compromise may derive from a pre-existing consensual or semi-consensual interaction with the perpetrator. 'Date rape' is the best-known instance: the parties may have seen

each other socially, and even have engaged extensively in intimate physical contact (petting). When one party refuses to 'go all the way', nothing approaching violence or physical coercion may be involved, and to seek it may be gravely mistaken. The emotional and physical complexities are less crass, and demand a proportionate response from the fact-finder.

[238] The erroneous inference that the complainant claimed that physical force was used in her rape shows in my respectful view an attempt to apply the wrong conceptual model (or 'paradigm') to the violation this case involves. What is more, it highlights an approach to the complainant's evidence that in my view does not justly appreciate the situation it evoked.

[239] This emerges also from Streicher JA's conclusion that the complainant's evidence about whether she initially thought that she had been raped is contradictory. This, he considers, points to the improbability of her complaint. He appears to regard her evidence about whether she considered that the interaction between her and the appellant constituted a 'relationship' in a similar light.

[240] With respect, I cannot agree with this approach. The complainant testified in chief that, after her initial refusal to consent to intercourse, later occasions of intercourse 'just happened', that is, without objection from her (*dit het net gebeur*). The appellant intimated to her that they were in a relationship (*dit is 'n verhouding wat tussen hom en my is*), and that it was right to have intercourse (*dit is reg om dit te doen*). She obviously felt uneasy about this construction (*ek het baie daarteen gestry*), but without avail.

[241] Later she told her aunt Mrs van Rooyen 'the whole situation', and Mrs van Rooyen told her that it was not a relationship but sexual molestation and rape. She testified that she also told Dr van Rooy what had happened, and that he 'also' (ook) told her that it was sexual molestation and rape. When asked why she did not tell anyone in the light of this knowledge , she explained:

'Because I know after a time that it was happening … I could no longer say No to Johan Marx. Rape is when you say No. That happened the first few times. I was still uncertain and scared, because if I report it to the police, then my parents get to know of it. And I wasn't ready to tell them …'

[242] In cross-examination she suggested that Dr van Rooy was the person who told her 'for the first time' that the 'verhouding' was not a relationship but in fact (*wel*) sexual molestation and rape. But this clearly arose from a confusion on her part, since she claimed that Dr van Rooy told her this before she wrote her school-leaving examination (in November 1999). She therefore clarified that her aunt had 'also' told her that it was 'molestation or in fact if he had sexual intercourse with me and I said No, then it is rape'. She explained that she told Mrs van Rooyen that it was a 'relationship' after which her aunt asked her about 'everything that happened'. She related 'everything' to her.

[243] When asked why she did not tell the psychologists and psychiatrists treating her in 2000 what her aunt had said, she explained –

'For me it was a relationship. I did not know what rape or molestation is, what it entails, how far you may and may not go before it is molestation. For me it was, Johan Marx told me ten thousand times, "Just remember, this is a relationship between me and you this."'

[244] Taxed again about why despite what her aunt had told her she did not inform Dr Swart and Dr Marais, she confirmed that she continued to have ambiguities or uncertainties (*ek het nog onduidelikhede gehad*): 'For me, it was this, Johan Marx said this is a relationship, doesn't matter who says what, it's going to count against you.' She was then asked whether before speaking to her aunt in November 1999 she realised that what had occurred was sexual molestation and rape. She replied that she hadn't thought of it that way:

'To me it had still been said it was a relationship, it is not rape. It is a relationship between me and Johan Marx. And what he said to me is all that stuck in my head. For two and a half years he tried to imprint this in my head to understand. I knew that rape is when someone … tries to have sexual intercourse with you when you say No. But as he made me to understand, it was a relationship.'

[245] Persisting, the cross-examiner asked her whether she didn't realise before her school-leaving examination that what happened was sexual molestation and rape. She replied, 'I knew that it was rape and molestation, but because later I couldn't say No any more, I thought that I … I shared guilt in it' (*ek het skuld daaraan*). She went on to clarify that it was her aunt who explained that the fact that after a time she just submitted (*ten spyte van die feit dat ek wel na die tyd net ingegee het*) did not invalidate the case against the appellant. She went on to explain:

'The first time he did it without my saying Yes to him. And that is where I was confused. The first few times I said No, but later I couldn't any more. It just happened so fast. He … I thought, but if one time Yes … not Yes, but if it happened one time and I just allowed it, what of the first time.'

[246] Later the cross-examiner returned to the 'verhouding' issue. The complainant testified that the appellant imprinted the idea that it was a 'relationship' so into her head that she believed him. After the complainant's examination and re-examination, the magistrate asked whether she had not been attracted to the appellant, especially in the light of the fact that he told her that there was a relationship. She replied, 'No, I knew we did not have a relationship and I was also not attracted to him, no'.

From this it seems evident that the complainant –

a. knew that her refusal to consent to intercourse with the appellant entailed the crime of rape;
b. later did not withhold consent;
c. thought that the fact that she later consented to sex negatived her initial refusal;
d. was told by the complainant that they were in a relationship, and that their sexual contact was right;
e. resisted his explanation, and felt guilty and angry with him within their 'relationship';
f. felt guilt, self-blame and fear about the situation she was in;
g. thus both accepted and did not accept that they were in fact in a relationship;
h. told her aunt 'everything' that had happened, including the non-consensual nature of the initial acts;
i. similarly told Dr van Rooy everything;

j. was assured by both of them that, despite being told by the appellant that they were in a ‘relationship’ that rendered the sexual acts ‘right’, what had happened was sexual molestation and rape;

k. regarded this as a revelation in view of confusion in her views and insights and feelings;

l. despite these assurances, in particular those of her aunt, still felt intense guilt, anxiety and uncertainty about the moral and legal character of what had happened, and the consequences of her exposing it, until she was at last able to charge the appellant in October 2000.

[247] To fault this account is in my view to mistake complexity for contradiction, and nuance for incoherence. The complainant’s account was nuanced and intricate. Yet it was coherent. It is to her credit that she presented this situation in its full complexity. She explained with frankness her conflicting feelings and perceptions about what had happened to her, perceptions that were clouded by the appellant’s deliberately self-interested construction of events, and by his menacing attitude toward her own credibility and the interests of her family. And it should not be necessary to add: they after all were the feelings and perceptions of a vulnerable and clearly distressed adolescent.

[248] And it is not hard to understand why she did not thoroughly digest that she had been molested and raped, and that what she had with the appellant was not a ‘relationship’: indecent assaults and rapes are perpetrated by strangers in dark alleyways, and not in a middle-class family home by a man whom you trust

and need and regard as a father-figure, and who is married to a woman you love and is the father of children whom you love.

[249] The suggestion that the complainant can be expected to have had clarity on her feelings and perceptions regarding her interaction with the appellant, in the months after they occurred, seems to me to overlook the implications of the medically attested psychological crises the complainant experienced during 1999/2000. These culminated in more than one hospitalisation for psychiatric treatment. The complainant testified that it was her search for mental health that impelled her to account fully and truthfully for what had happened between her and the appellant, and it was only after she embarked on that path that she attained stability.

[250] Streicher JA considers that the mental trauma the complainant experienced during 1999 and 2000 affords no corroboration for her account. I do not agree. Asked in his evidence in chief about the complainant presentation to him as a patient, Dr van Rooy's response was that there is 'without doubt' a direct connection between the development of post-traumatic stress symptoms in children [the record erroneously has 'en'] who have been sexually molested, and development of anxiety and depression. He added that there 'could' (*kon*) have been various other causes, but that molestation 'could surely' (*kon sekerlik*) have been a factor in the complainant's condition. In answer to later questions from the magistrate he stated that it would be wrong to attribute 'all her symptoms' to (for instance) the molestation: 'There are surely many other factors that contribute to them', he said.

[251] The evidence of Dr van Rooy establishes that while the complainant's psychological distress in 1999/2000 should not be attributed solely to sexual molestation, it is compatible with its occurrence. That corroborates the complainant's assertion, which the magistrate and the High Court in my view rightly accepted, that the interaction with the appellant was the root cause of her panic attacks and anxiety in that period.

[252] Streicher JA finds it difficult to believe that in view of what had befallen the complainant (haar wedervaringe) she could in September 2000 still have believed that there had been a relationship with the appellant. But this also omits to take into account the conflicting perceptions and uncertainties regarding the 'relationship' that the complainant's evidence portrayed, as well as the medical evidence that she was at the time in a parlous psychological condition. Her prior conduct exhibited a needful naiveté that left her vulnerable to exploitation at the hands of the appellant, and, even as she managed to start to break free from him, in a state of continuing distress and confusion. To count against her in the reckoning the nuances and complexities of her perceptions during this process seems to me inappropriate.

[253] At the heart of the case lies the fact that according to her own testimony the complainant was trapped, and felt herself trapped, in a quasi-relationship with the appellant – one into which his own invasive conduct manipulated her and to which her vulnerability as a troubled teenager left her susceptible. Two questions arise from this, one for the prosecution, and one for the defence. Why did she continue to go back to the Marx household, despite the unwanted

conduct of the appellant? And why would she falsely testify that she refused consent to the initial sexual contact if she in fact consented? I turn to the second question after considering the significance of the appellant's lying evidence.

The complainant's repeated return to the Marx household

[254] The complainant testified that she was drawn there by her bond with Mrs Marx and the children, and by her feelings of guilt toward her. Judged with clinical dispassion, this was neither logical nor wise, and Streicher JA accordingly finds it difficult to accept that it was not clear to her that her presence in the home was likely to contribute to Mrs Marx's problems, and expresses difficulty in understanding how, in the face of logic and good sense, a troubled and needful teenager could continue in a familial association that was doing neither her nor the family any good. Nugent JA too expresses considerable difficulty in accepting the complainant's account on this issue. I cannot agree.

[255] The complainant testified that the appellant repeatedly assured her that they were in a relationship. Her acceptance of this was reluctant and resentful, but it is clear from her evidence that his repeated assurances and blandishments did have a persuasive effect on her thinking and feelings. She felt abused and misused, but – as she testified – she also eventually submitted without protest to his sexual attentions. This doubtless shows an adolescent lack of wisdom, but it is no basis for disbelieving her testimony that she refused at first.

[256] What she had with the appellant was no doubt, in Vladimir Nabokov's phrase 'a poor simulacrum of love'; but a simulacrum for a time it was; and in

the state of confusion and distress and needfulness her testimony depicted, the Marx household and her relationship with Mrs Marx amounted, as she testified, to something to return to. That she also knew that what was happening was degrading and wrong and dangerous (and, as she also stated, not a true relationship – at least not in any respectable, mutually respectful or honourable sense) is clear. It is not for us to judge these motive forces unwise, or to inimise them in our evidentiary assessment.

Should the appellant's false testimony add to the inference of guilt?

[257] Streicher JA and Nugent JA conclude that the fact that the appellant lied about the extent of the sexual interaction with the complainant, while a factor, does not weigh strongly against him in determining his guilt. Both consider that the appellant could have had other reasons for lying about the nature of the sexual relationship, other than that it started in non-consensually invasive conduct, and that his lying evidence therefore does not strengthen the state case.

[258] I do not share this view. Streicher JA suggests, first, that admitting to the under-age groping, before the complainant turned sixteen, could have rendered the appellant liable to conviction on the statutory offence of indecent assault, even had she consented. This has proved to be the case, but there is no suggestion in the evidence that the appellant knew that such an offence existed, nor did the state make any attempt to rely on it (though a competent verdict) until after this appeal, when the court itself raised the question. The appellant had no reason to think that he was at risk: the complainant's evidence

established only that he thought that under-age intercourse could render him liable to prosecution.

[259] Streicher JA also suggests that for the appellant to admit to a sustained sexual relationship with the youthful complainant would put him in a poor light with his wife, his children and the community even if she had consented. This seems implausible. The appellant's plea explanation formally admitted to consensual groping, and consensual intercourse, with a schoolgirl. It is hard to see why delicacy of social standing or family feeling should induce him to deny more extensive occurrence of both, if indeed they occurred consensually.

[260] My colleagues' suggestion that there are real possibilities for the appellant to lie, other than his guilt, must also meet logic. Their approach suggests that the appellant would run the risk of being unjustly convicted of sexual assault and rape rather than admit to a more extensive – albeit wholly consensual – relationship. This is neither probable nor plausible.

[261] More compelling is the inference that the appellant's reason for denying the more extensive relationship was that, embedded at its start, was the poison of the crimes to which the complainant attested. He could not admit to the full truth, because the full truth was that he overbore the complainant's initial refusal. The appellant lied about the extent of the sexual relationship because he knew that admitting its duration would support the inference that the complainant had not given her consent at its start.

[262] Significant here is that his plea explanation placed both consensual events in the latter half of 1999 – when the complainant was as old as possible. That is

a telling distortion. The younger the complainant, the stronger the inference that she did not consent, and could not have consented. His lie must therefore contribute to the inference of guilt.

What motive could the complainant have had for falsely incriminating the appellant?

[263] Finally, there is the question of the complainant's possible motive for falsely incriminating the appellant. No adequate motive was suggested or ever put to her. The regional magistrate and the High Court in my view rightly found that there was none.

[264] Nugent JA considers it unnecessary to explore this question. Streicher JA questions the finding of the courts below that since there was no relationship the complainant could not have had any jealous motive against the appellant. He finds that the complainant considered that there was a relationship, and that the evidence reveals indications of possible jealousy on her part as a motive for falsely testifying against the appellant. He adds that even if there were no true relationship between the appellant and the complainant – as both the regional magistrate and the High Court found – the fact that the appellant falsely represented to her that there was provides a motive – contrary to the magistrate's approach – for embittered chagrin against him. Neither suggestion in my view withstands scrutiny.

[265] While neither of my colleagues finds that the complainant had a motive falsely to incriminate the appellant, in my view the absence of any suggested motive is itself significant to the resolution of the case. Regarding the possibility

of jealousy, Streicher JA alludes to the complainant's testimony regarding her reaction when the appellant fondled his wife. On one such occasion, on which the complainant was extensively cross-examined, the appellant left the door to the marital bedroom open after the complainant rebuffed him, so that, lying in bed next door with the children, she could hear their love-making. The next morning he told her that he had done so deliberately for her to hear.

[266] But it is hard to see why jealousy of any sort, or jealousy arising from the complainant's exposure to the couple's love-making, should provide substantiation for a theory of false incrimination. The complainant was candid about the extent to which she regarded herself as involved in a relationship with the appellant. She volunteered the open-bedroom-door incident during her evidence in chief to illustrate the appellant's petulant and manipulative conduct during the period when she believed that there was in fact a relationship between them. She explained during cross-examination that –

'I just felt that [the love-making] was going to be a personal thing between him and his wife. And for me at that stage, just because I wouldn't do for him what he said and he does it and his wife makes sounds, I think that would upset anyone if they were to hear it. And I knew that he was doing it to get me back because I resisted him. And, yes, it made me unhappy and made me feel uncomfortable. I was in a room just next to them, I heard it all. For any person it would not be pleasant and uncomfortable.'

[267] This is hard to fault. Jealousy as a possible motive must in my view founder on the complainant's candour. There is nothing apart from what she admitted to in her evidence. Jealousy is too flimsy to account for false charges –

unless, of course, one regards women as incipiently inclined to destructive jealous malice, and I do not believe my colleague suggests this.

[268] The alternative – chagrin because 'you misled me about a relationship' – similarly fails to withstand scrutiny. Such chagrin would provide a motive for denouncing the appellant to his wife, to his community, to his church or to his friends, but not to accuse him falsely of rape. It is insufficient to account for the immensely more momentous step, which the complainant knew would damage the husband of a woman, and the father of children, to whom she convincingly expressed deep attachment.

[269] I would point out that in any event no motive for false incrimination was ever put to the complainant during her evidence. She was asked in connection with the open-door episode whether it made her jealous, but not regarding false charges. All that was put to her, at the end of a particularly exhaustive cross-examination, was that she was filled with (unspecified) hatred toward the complainant, and wanted to see him go down.

[270] The complainant, as already emphasised more than once, was cross-examined over two days by experienced senior counsel. He did not propose jealousy or embittered chagrin. The complainant therefore had no opportunity to deal with them. The motives were not even mentioned in argument on behalf of the appellant. It would in my view be unfair and inappropriate to use them now as a basis for discrediting the complainant's evidence.

[271] In general, fairness and the constitutional entitlement to dignity in my view require that, where an accused in a sexual assault case is adequately

defended, if the possibility of malicious motive is to feature in the resolution of the issues, that motive should be canvassed in the complainant's evidence. The absence of any suggested or plausible motive here must in my view contribute to the weight of the state's evidence in this case. We have no idea, though we may imagine, how the complainant would have responded if her cross-examiner had accused her of figmenting the charges against the appellant because she was jealous of his wife – a woman to whom she was deeply attached – or out of chagrin at being misled and sexually abused by the father of the children she cared for and loved.

[272] Though my colleagues do not find that the complainant in fact had a malicious motive, past judgments of this court have ranged freely and widely in search of possible motives for complainants to lay false charges against their alleged sexual attackers. An instance is *S v F* 1989 (3) SA 847 (A). *S v F* and the authorities it invoked preceded the abolition of the cautionary rule in rape cases (*S v Jackson* 1998 (1) SACR 470 (SCA)). The method of operation those cases employed in my view violates the dignity of complainants and is no longer acceptable. Accused persons are entitled to be acquitted when there is reasonable doubt about their guilt. That does not make it necessary or permissible for motives to be freely imputed to sexual offence complainants at appellate level when these were not fairly and properly explored in their testimony. To permit this would threaten return to the indefensible days when complainants were treated as inherently unreliable, inherently inclined to false

incrimination, and inherently disposed to destructive jealousy in relation to their consensual male sexual partners.

[273] A company director in a commercial setting who seeks to establish that a gain was of a capital nature, rather than income, is spared the indignity of such ex post facto imputations of and free-ranging speculations about motive. The President of the country, no less than other witnesses, is similarly spared: see *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) paras 72-125. Where the accused is adequately defended, complainants in sexual assault cases should be entitled to no less.

[274] The magistrate and the High Court were for these reasons correct to conclude that the absence of motive to accuse the appellant falsely of crimes added weight to the conclusion that the complainant's testimony was true.

[275] The appeal against both conviction and sentence should in my view be dismissed.

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E CAMERON
JUDGE OF APPEAL

NUGENT JA

[276] I have had the benefit of reading the judgments of my colleagues Streicher and Cameron in draft form. I agree with the orders that are proposed by Streicher JA for the reasons that follow.

[277] The process of examination and cross examination in a court of law is on occasions a blunt instrument for revealing the truth, and that is particularly so where, as in this case, the evidence concerns matters that might be emotionally and psychologically complex and nuanced. But then it is common for the full truth not to emerge in the course of a criminal trial, which has the limited function of determining whether there is sufficient and adequate evidence to establish beyond reasonable doubt that the accused person committed an offence. In the absence of such proof in relation to each element of the offence the accused person is entitled to be acquitted albeit that the full truth might not have emerged. That applies no matter the nature of the offence.

[278] The rejection of the appellant's evidence – and in my view it was correctly rejected – leaves us with only the complainant's account of what occurred during the course of a secret relationship between the complainant and the appellant that commenced when the complainant was not yet sixteen years old and endured for over two years. I agree with my colleague Cameron that it would not be remarkable if the evidence of a young person who was entrapped in a sexually exploitative relationship reflected ambiguity, ambivalence, and confusion, for ambiguity, ambivalence and confusion, and even unwarranted guilt and shame, will often be inherent in the experience itself, and that must be borne in mind when assessing the evidence. But one must also steer clear of imprinting upon the evidence a behavioural stereotype or conceptual model or paradigm assembled from the experiences of others, for each relationship will have its unique participants whose experiences might or might not coincide.

Where I disagree with him is on the facts of the present case as they emerge from the evidence.

[279] The effect of the appellant's plea – which was an almost complete denial of the complainant's account of what occurred – was to put the state to the proof of all the elements of the alleged offences and that included the absence of consent. (The admissions made by the appellant were only indirectly relevant to the discharge of that onus.) That onus did not shift during the course of the trial.

[280] The trial court, and the court *a quo,* weighed the evidence of the complainant against that of the appellant, rejected all the appellant's evidence, and accepted all the evidence of the complainant as if that was the natural corollary.

[281] I have no doubt that the appellant's evidence was false in all material respects and was correctly rejected. But it does not follow from the rejection of the appellant's evidence that all the evidence of the complainant is necessarily reliable and true. Evidence that traverses numerous issues, as the evidence did in this case, might often be unreliable or untrue only in parts. What is required is not simply a comparison of the competing evidence but also an assessment of the veracity and reliability of the evidence in relation to each element of the offence. That applies even where the evidence on those issues stands unchallenged by contradicting evidence, for a criminal court has a particular duty to avoid injustice, which is encapsulated in the following well-known extract from the judgment of this court in *R v Hepworth* 1928 AD 265 at 277:

'A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figurehead, he has not only to direct and control the proceedings according to recognised procedure but to see that justice is done.'

[282] It is clear from the judgments of both the courts below that, having weighed the appellant's evidence against that of the complainant and rejected that of the appellant, they assumed without more that the evidence of the complainant must necessarily all be true. For in neither judgment is there any assessment of the complainant's evidence once isolated from the appellant's denials to determine whether it was true and reliable in all material respects and in particular in relation to the absence of consent. In that respect, in my view, they erred.

[283] I do not think we ought simply to defer to the trial court's findings notwithstanding the care with which they were arrived at. This court has cautioned on more than one occasion, most recently in *Medscheme Holdings (Pty) Ltd v Bhamjee,*[4] against according undue weight to the advantages that are said to be enjoyed by a trial court, and has said that the demeanor of a witness is no substitute for evaluating the content of the evidence, taking into account the wider probabilities.[5] (The trial court's favourable impression of the appellant, notwithstanding that his evidence was almost entirely false, underscores the point.) Moreover, it is clear from the trial court's judgment in the present case

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4 Unreported judgment delivered on 27 May 2005 under Case No. 214/04.

5 *Body Corporate of Dumbarton Oaks v Faiga* 1999 (1) SA 975 (SCA) 979I; *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) para 16; and in a criminal context *S v V* 2000 (1) SACR 453 (SCA) 455f-h.

that, if demeanor played any role at all in its assessment, the role that it played was negligible. Apart from observing that there was nothing exceptional in the demeanor of either the appellant or the complainant the trial court's assessment rested entirely on the content of their evidence, all of which appears from the record and is equally capable of assessment by this court. But in any event there is no warrant for deferring to the trial court's findings on an issue that it failed to enquire into at all.

[284] I have no reason to doubt that the sexual acts described by the complainant indeed occurred and in that respect I agree with the trial court and the court *a quo* that the state discharged its onus notwithstanding the appellant's denials. But it was also for the state to prove, beyond reasonable doubt, that the acts that occurred after the accused was sixteen years old occurred without her consent, for that is an element of both offences. Although the appellant did not contradict the complainant's evidence on that issue (nor could he, in view of his denial that the acts were committed at all) that is not decisive. As pointed out by Howie P in this court in *S v York* 2002 (1) SACR 111 (SCA) para 19:

'It is always, of course, for the prosecution to prove the absence of consent. This entails that even if the defence, as here, is that no intercourse took place, the court must, in the adjudicative process, be alive to the possibility that there might have been consent nonetheless.'

The learned judge went on to emphasise, nonetheless

'… that without an evidential basis such a possibility would be no more than speculative and one would be free to disregard it in coming to one's eventual conclusion. And it need hardly

be said that an accuser's failure to allege consent will be weighed in the scales when considering whether the postulated possibility is reasonable or not.'

[285] It does not follow from the fact that the appellant lied about the occurrence of the sexual acts that they must have been non-consensual. While the falsity of the appellant's evidence, and the fact that he did not contradict the complainant's evidence on that score, is a factor to be borne in mind when weighing the evidence, it ought not to be elevated beyond its due. It is the state, and not the appellant, who bears the onus, and it ought not to be inadvertently reversed. Various reasons come to mind in the present case, some of which have been averted to by my colleague Streicher, why the appellant might have lied about the occurrence of the acts even if they were consensual. Not least is the possibility that at the time the appellant instructed his advisers he was still under the impression that to admit the occurrence of the events would not have availed him even if they were consensual. For it appears from the complainant's evidence that throughout the relationship both the appellant and the complainant believed that the legal age for consent to sexual intercourse was eighteen years. (Even after the complainant had turned sixteen the appellant often said to her that if they were caught having sexual intercourse he would be 'state fodder'.) Seen in that context it is significant that the only act of sexual intercourse to which he admitted occurred on the complainant's eighteenth birthday. And having made that limited admission it is not difficult imagine why he would also feel constrained to make only a limited admission in relation to the conduct that preceded it. But it is in any event not necessary to establish what the appellant's

motive was for lying, nor what motive the complainant might have had for falsely implicating him. Where real possibilities present themselves that are not consistent only with the appellant's guilt it would be dangerous to draw any inferences from those facts alone.

[286] The conviction for rape was founded upon the events that occurred on 31 March 1998. The complainant did not purport to suggest that she was overborne by the appellant's emotional grip into which she had become entrapped by complicity and guilt and collusion. The complainant's explanation for what occurred was that the appellant physically overbore her unwillingness to have sexual intercourse. She said that after the appellant arrested her intended departure by catching at her arm he physically pressed her to the floor, physically overcame her attempts to resist her clothing being pulled down, and then entrapped her by the physical power of his body while sexual intercourse occurred. The complainant's account of how she was physically overcome by the appellant was inconsistent and unconvincing but those are not grounds for attributing the alleged overcoming of her will to other, non-physical, means that were not attested to by the complainant. It suggests rather that the complainant's will might not have been overborne at all and that her evidence in that regard might not be true.

[287] In my view there are indeed improbabilities in the complainant's account of how she came to be in the bathroom with the appellant in the first place, many of which are referred to by my colleague Streicher, and in her account of

how her unwillingness was overborne by the appellant, but there are two further aspects of the complainant's evidence that trouble me in particular.

[288] I do not think that it is necessarily significant that the complainant failed to report what had occurred. If the complainant was indeed entrapped in a non-consensual quasi-familial relationship it is quite possible that she might have been inhibited from disclosing it by feelings of complicity, shame and guilt, even if they were unwarranted. But she would be even more inhibited from disclosing it if she was in fact complicit and was thereby betraying the friendship and affection of the appellant's wife. Inferences from her silence are thus capable of being drawn in either direction and I consider her silence to be neutral in the assessment of the evidence.

[289] But the complainant ultimately broke her silence, in about November 1999 when she talked to her aunt, and there would then have been no reason to withhold the truth of what had occurred. The complainant was prompted to break her silence by the fear that she might be pregnant, which caused her considerable distress, as well it would have done, bearing in mind that she could not confide in her parents, nor could she expect any support from the appellant, who had told her on more than one occasion during the course of the relationship that if ever she became pregnant she was to pass the sexual liaison off on someone else. At first the complainant sought assistance from her aunt on the basis that it was a friend who thought she might be pregnant, but then she confessed that she was referring to herself. She related what then occurred as follows:

'… Toe sê ek vir haar dit is 'n getroude man. Ek het vir haar gesê dit is 'n verhouding. Toe vra sy vir my alles wat gebeur het. Ek het vir haar gesê wat gebeur het, hoe dit gebeur het en dat ek vermoed ek is swanger. Dat ek vermoed ek is swanger, ek weet nie. Ek is bang, ek weet nie wat om te doen nie. Toe sê sy vir my, "Wel, die eerste ding wat ons gaan doen, ons koop môre 'n swangerskaptoets en ons kyk of jy swanger is en dan neem ons dit van daar af verder.".

Goed. U het, met ander woorde, vir haar gesê 'n getroude man het met u gemeenskap gehad, u is bekommerd u is swanger? -- Ja.

En wat het u haar gesê oor 'n verhouding? -- Ek het vir haar gesê die man sê dit is 'n n verhouding tussen my en hom, maar ek het ook haar verduidelik hoe dit gebeur het, want sy wou geweet het hoe en waar het ek ja gesê. Toe sê ek vir haar ek het vir hom die eerste keer gesê, nee. Later was dit so dat ek nie meer teen hom kon stry en baklei nie, hy is 'n groot man teen my, ek kan nie teen hom stry en baklei nie. En later het dit net gebeur. Toe sê sy vir my, "Wel, Marlese, die heel eerste keer wat hy dit gedoen het en jy het vir hom nee gesê, was dit verkragting, want jy het nie toestemming gegee nie." En selfs die feit dat hy aan my vat is seksuele molestering.'

[290] As pointed out by my colleague Streicher, the complainant's evidence that she told her aunt that she had said 'no' is not corroborated by the evidence of her aunt. While a direct question from the prosecutor on that point might indeed have been impermissibly leading, as pointed out by my colleague Cameron, I do not see how that serves to redress the absence of the evidence. It was also not incumbent upon counsel for the defendant to probe gaps that might have been left in the state's evidence, even if they were left only by uncertainty or ambiguity, for the onus rested throughout upon the state. I have little doubt that the appellant's counsel was acutely aware of that and I see no grounds for

inferring that he took for granted that the complainant reported to her aunt that she had said 'no'. I think it strains the evidence unduly to suggest that that was implicit in the evidence of Ms van Rooyen. On the contrary, in my view her evidence is not even ambiguous on that issue, and instead points strongly in the other direction. If Ms van Rooyen had been told by the complainant that she had not consented Ms van Rooyen would surely have told the complainant that what had occurred constituted rape. Instead what she told the complainant was only that it was wrong because the complainant was a minor, as appears from the extract from her evidence that is quoted by my colleague Streicher but it bears repeating:

'Goed. Wat het toe gebeur nadat sy aan u die mededelings gemaak het? -- Ek het vir Marlese vertel wat gebeur het is verkeerd, want sy was minderjarig en dit was 'n volwasse persoon.'

That evidence, in my view, simply does not open itself to the construction that Ms van Rooyen was told that sexual intercourse had occurred against the complainant's will.

[291] About ten months later the complainant also disclosed to Dr van Rooy what had occurred. The clear inference from his evidence is that she did not tell Dr van Rooy that she had expressed her unwillingness but had been overborne by the appellant. His evidence, in response to questions from the prosecutor, was as follows:

'Ja, wat het sy vir u gesê? -- Wel, uiteindelik van die inligting wat bekend gemaak is, het sy gesê dat sy beide betas is en dat daar penetrasie ook plaasgevind het.

HOF: Dit is nou inligting wat u by haar bekom het? -- wat sy … wat sy aan my geopenbaar het. En dit het voorgekom voor die ouderdom van 16. Sy kon nie vir my 'n presisese ouderdom gee wanneer dit vir die eerste keer [gebeur] het nie. Dit is die aard van die molestering wat sy beskryf het.'

In cross-examination he described what he recorded in his contemporaneous notes as follows:

'Ja. In die eerste sin het ek geskryf, "Seksueel gemolesteer deur ouer se huivriend". En dan die verdere inligting is dat sy wel vir haar tannie, haar pa se stiefbroer se vrou het sy genoem in Desember 1999 vertel het daarvan en vir haar verloofde twee weke voordat ek haar gesien het.'

In response to a request to repeat part of that evidence he said the following:

'Desember 1999 het sy haar tannie, haar pa se stiefbroer se vrou vertel van die beweerde loestering, en haar verloofde twee weke voor hierdie evaluasie. Hy het haar nie verwerp nie het sy genoem. Sy het verwys na 'n sakevriend van haar pa wat haar seksueel gemolesteer het en genoem dat die omvang daarvan betasting en penetrasie was en dat dit haar seksuele verhouding met haar verloofde beinvloed.'

He added that, although he had not recorded it in his contemporaneous notes, he recalled querying the complainant's age at the time sexual intercourse occurred, and his evidence continued as follows:

'Wat ek in belangstel is dat so u getuig het, het beide die betasting en penetrasie voorgekom voor die ouderdom 16, dit is soos u dit verstaan het? -- Dit is hoe ek dit verstaan het. Ek het dit nie op 'n nota neergeskryf nie, maar dit is wat ek van geheue vir u kan sê.

Goed – Want ek moes op daardie stadium gesê … vir haar net ingelig dat dit basies statutere verkragting is as iemand onder die ouderdom van 16 seksuele omgang sou hê met 'n vroulike persoon.'

Ja, korrek. --- Dan sou my situasie anders gewees het en ek sou anders opgetree het as sy onder die ouderdom van 16 was.

Ek verstaan wat u sê. As ek mag opsom, net seker te maak dat ek reg verstaan wat u sê is, aan u was gesê daar was penetrasie gewees voor ouderdom 16. U het geweet iemand onder 16, dit is statutere verkragting as daar seksuele penetrasie was en dit is wat u aan haar gesê het? – Bevestig.'

[292] I would be most surprised if a psychiatrist to whom it was reported that sexual penetration had occurred without consent would record no more than that there had been 'sexual molestation' and I see no foundation for the suggestion that he or she would do so. On the contrary, in my view it is most improbable that Dr van Rooy would have told the complainant that she had been 'statutorily raped' if what she had told him disclosed the offence of rape. It is also most improbable that he would not have expressly noted that fact on his file if that is what he was told, and it is as improbable that he would not have remembered that fact when giving evidence in a trial on a charge of rape but instead have remembered only that he had queried the complainant's age. In my view it is improbable that Dr van Rooy was told by the complainant that she had not consented to sexual intercourse but had been overborne. By itself that also casts doubt upon whether she said that to her aunt because there was no reason not to repeat the same account to both her aunt and to Dr van Rooy.

[293] What also appears from the evidence of Dr van Rooy is that at the time the complainant disclosed the relationship to him (sometime after 13 September 2000 but before 23 October 2000 when she reported it to the police) she had not

yet disclosed it to her parents, and had disclosed it to Mornè (to whom she was then engaged) only a fortnight earlier. (Her evidence was that she disclosed the relationship to Mornè 'a few months' after they met in about January or February 2000 and before they became engaged). She said that she had been reluctant at first to disclose the relationship to Mornè because she feared that she might lose him if he knew that she had 'had a relationship with a man who was almost 40 years old', as appears from the following extract from her evidence, part of which I referred to earlier:

'Ek het eers nie vir Mornè vertel nie, want wat sal Mornè van my dink? 'n Meisie van 18 jaar wat 'n verhouding met 'n amper 40-jarige man het. Ek was bang om vir Mornè te verloor, hy is 'n wonderlike mens. Hy aanvaar my vir wat ek is. Ek was bang ek verloor Mornè as ek hom die waarheid vertel.'

Nothing in her evidence suggests that she was inhibited from disclosing the relationship to Mornè by the fact that she had not consented, and there was no reason for her to fear disclosing that fact.

[294] After she had made her disclosure to Dr van Rooy, according to the complainant, she reported to Mornè 'what the doctor had said' (which, according to Dr van Rooyen, was that she had been 'statutorily raped') and it was then that Mornè urged her to take the matter further and ultimately she disclosed the relationship to her parents and reported to the police that she had been raped. (She made her report to the police on about 23 October 2000.) In my view it is improbable that the complainant told Mornè that she had not consented when she first disclosed the relationship to him, which, according to

what she told Dr van Rooy, must have been not earlier than about the end of August 2000. If she had done so he would surely have urged her at that stage to report the matter and he would not have been prompted to do so only when she told him what Dr van Rooy had said.

[295] It is clear that the complainant did not disclose the existence of her sexual relationship with the appellant to anyone but her aunt – and then only because she thought she was pregnant – until she disclosed it to Mornè in about August 2000 and thereafter to Dr van Rooy. That the complainant reported the matter to nobody until she made these disclosures is not significant in itself for reasons that I have given. But what is significant is that when she did make those disclosures it is improbable that she told any of the persons concerned that the sexual acts had occurred against her will. There was no reason to withhold that information if that is indeed what occurred and the improbability of her having done so casts considerable doubt upon the complainant's evidence.

[296] There is a further aspect of the complainant's evidence that also troubles me. Sexual intercourse first occurred on 31 May 1998 and it occurred for the last time on the complainant's eighteenth birthday on 9 October 1999. During the intervening period of about sixteen months sexual intercourse took place on numerous occasions. The complainant could not recall how many times it occurred but estimated that she had sexual intercourse with the appellant about thirteen or fourteen times in all. According to the complainant she said 'no' on the first six or seven occasions. Thereafter, according to the complainant, she

said neither ‘yes’ nor ‘no’ because she felt entrapped by the appellant’s persistence and merely submitted to what she considered to be inevitable.

[297] Leaving aside the first occasion that sexual intercourse occurred, the complainant said that on all but three occasions it took place on the bed in the appellant’s bedroom. It also took place on one occasion in the bathroom of the appellant’s house, on one occasion in what seems to have been a passageway, and on one occasion at the house that the complainant shared with her parents. On every occasion that it took place at the appellant’s house the appellant’s wife was away and when it took place at her parents’ house her parents were away.

[298] Thus on numerous occasions the complainant found herself alone with the appellant in his bedroom. How the complainant came to be alone in the bedroom with the appellant on the occasions that she said ‘no’ (and there is no reason to think that it was different on the other occasions) was explained in the following extract from her evidence:

‘Nou, kom ons praat van hierdie sewe gevalle waar u sê u nee gesê het. Hoe het u in sy slaapkamer gekom dat hy dit met u kon doen nou? -- Ons sit daar. As dit … baie keer was dit hy lê en krieket of wat, sport of wat ook al daar is. Die kinders sal wel miskien ook daar wees. Hy jaag hulle net uit en ek sit dan daar. En dan sal hy dit doen. Deur oop, alles. Of hy sal my … ons was altyd in die kamer, iets gedoen of televisie gekyk of iets en dan sal hy dit net doen.’

She went on to explain that the children would be outdoors but that she and the appellant could see when they were approaching.

[299] The occasion upon which intercourse occurred in the bathroom was described by the complainant as follows:

'Ja, hy het een keer was ek in die badkamer en hy het op die toilet … ek was in die badkamer en hy het vir my gesê, "Ons doen dit sommer gou hier." Daar was so 'n bankie. Hy het my toe sommer bo-op die bankie getel. Toe sê ek vir hom, "Nee". En hy het die venster toegetrek en hy het dit daar bo-op die bankie gedoen met my. Hy het nie omgegee waar hy dit doen nie, hy het net aan homself gedink.'

[300] Intercourse took place on one occasion at her parents' house. According to the complainant the appellant had telephoned to ask her to baby-sit the children and, after learning that her parents were away, he arrived at the house. She described what happened:

'En toe ek by die huis kom … toe hy by die huis kom, toe is ek … toe is hy daar en toe het hy dit … en toe het hy gemeenskap met my by my ma-hulle se huis ook gehad. Maar dit is al op daardie stadium wat ek nie meer … nie meer omgegee het wat met my gebeur nie.'

[301] On every occasion that the complainant was with the appellant in the bedroom she must have entered the house knowing that the appellant's wife was not there, or she must have remained in the house after discovering that the appellant's wife was absent or after the appellant's wife had left. She must then have accompanied the appellant to the bedroom, or she must have sought him out in the bedroom. Whenever the children were present, and were ushered out of the bedroom, she remained. On one occasion she made no apparent attempt to leave the bathroom when the appellant entered it. On another occasion she must have admitted the appellant to her parents' house when she was there alone and then have accompanied him to wherever it was that intercourse occurred. On all

those occasions the complainant must have done that well-knowing what was likely to occur when they were alone together.

[302] If the complainant had indeed been sexually assaulted against her will and then been raped I have considerable difficulty accepting that the complainant would have persistently allowed herself to be alone with the appellant thereafter. And that she would have vociferously protested at her father's attempts to prevent her from being in his company, which she described as follows:

'My pa het altyd gesê, "Ek is nie dom nie. Ek is nie meer vandag se kind nie, ek weet".

Bedoelende hy weet dat u 'n verhouding … (tussenbeide) -- Hy weet dat Johan Marx het attensies.

Hy het u nie verbied om daarnatoe te gaan nie? – Hy het, ja.

En het u daarna geluister? – Ek het met hom baie baklei daaroor, want ek het vir hom gesê, ek gaan nie om na Johan Marx te gaan nie, ek gaan om vir tannie Lettie uit te help. Ek en my pa het al hoeveel argumente daaroor gehad, want hy het Johan Marx glad nie vertrou nie.'

The complainant's explanation to her stepfather, and in her evidence, for continuing to visit the appellant's house was that she wished to maintain her relationship with the appellant's wife, but that seems to me to be a tenuous explanation for her persistent presence with the appellant, most often in the bedroom, when the appellant's wife was nowhere to be seen, and for her presence with the appellant in her parents' house when her parents were away. If she indeed wanted to maintain a relationship within the family it required no special maturity for a girl of sixteen or seventeen to avoid being persistently alone with the appellant in his bedroom.

[303] That the complainant persisted in being alone with the appellant, most often in his bedroom, by itself raises considerable doubt that she was an unwilling partner to what was occurring, as she alleged, but there is a further aspect of her evidence in that regard that also casts doubt upon its veracity. I have pointed out that the complainant said that on the first six or seven of the occasions that she found herself alone with the appellant she again said 'no' but sexual intercourse occurred nonetheless. Yet she still persisted in being alone with the appellant. I am not persuaded that the complainant said 'no' on the seventh occasion. Nor that she said 'no' on the sixth occasion, nor on the earlier occasions. And if the veracity of her evidence in that respect is open at least to doubt, which in my view it is, I do not think it can be relied upon alone to find that she said 'no' on the first occasion.

[304] But we are not called upon to find that the complainant's evidence that the sexual acts occurred without her consent is untrue and thus to reject it in order for the appellant to be entitled to be acquitted. He is entitled to be acquitted if there is only a reasonable possibility that her evidence on that issue might be untrue. In my view there is such a reasonable possibility, for the reasons I have given, with the result that the state failed to discharge its onus, and the appellant was entitled to be acquitted on the charges that he faced.

[305] But notwithstanding the reservations that I have in relation to the complainant's evidence that the sexual acts were not consensual I do not have similar reservations with regard to her evidence that they indeed occurred even taking account the caution to be observed before accepting the evidence of a

single witness. It seems clear that there was a long-standing sexual relationship between the complainant and the appellant and I see nothing improbable or inconsistent in the complainant's account of the acts that occurred in the course of that relationship and the time at which the first incident occurred. On the contrary, in my view the surrounding circumstances support the conclusions of the trial court and the court a quo that on that issue the evidence of the complainant was true. In those circumstances I agree with my colleague Streicher, for the reasons he has given, that the evidence establishes that the appellant contravened s 14(1)(b) of the Sexual Offences Act 23 of 1957, and that the matter should be remitted to the trial court for the appropriate sentence to be determined.

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R.W. NUGENT
JUDGE OF APPEAL