THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE/NOT REPORTABLE

Case No 323/2015

In the matter between:

LENTIKILE MICHAEL MOCUMI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation:	*Mocumi v The State* (323/2015) [2015] ZASCA 201 (2 December 2015).
Coram:	Navsa, Cachalia, Shongwe, Tshiqi and Dambuza JJA
Heard:	**11 November 2015**
Delivered:	**2 December 2015**

Summary: Criminal law – evidence - contradictions in the evidence of child complainants in sexual offence cases – contradictions not necessarily fatal to state case – evidence must be considered carefully – discussion of onus borne by the State - court must be satisfied that despite contradictions the evidence constitutes proof beyond reasonable doubt of commission of the offence and identification of the perpetrator – relevant considerations include the age and capacity of the child.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Djaje AJ and Hendricks J, sitting as a court of appeal):

The following order is made:
The appeal is upheld and the order of the court below is set aside and substituted with the following:
'The appeal is upheld and the conviction and related sentences are set aside.'

JUDGMENT

Dambuza JA (Shongwe JA concurring):

[1] The sexagenarian appellant was convicted by the Taung Regional Court of the North West Province on a charge of raping a 12 year old child. He was sentenced to 15 years' imprisonment. The magistrate immediately granted him leave to appeal against both the conviction and sentence and he was released on bail pending the appeal. On 6 November 2014 the Northwest Division of the High Court, Mahikeng (Djaje AJ and Hendricks J) dismissed his appeal against conviction and altered the sentence by suspending five years of the 15 year sentence. This appeal is against the conviction, special leave having been granted by this court.

[2] The charge sheet stated that the rape occurred during the period 1 to 28 February 2006. Broadly, the allegations on which the charge was based were that whilst transporting the complainant to school in his vehicle the appellant had non-consensual sexual intercourse with her in the vehicle.

[3] It was common cause before the regional magistrate that in 2006 the complainant and her parents lived in Mokgareng Village, Taung in a house owned by the appellant's in-laws. The complainant attended school at Ntokwe Primary School,

some distance away from home. The appellant provided transport for her and other children in the vicinity in his van. Initially, the complainant's mother paid the appellant for these services; but in about March 2006 she stopped making payments for a reason I will discuss later in this judgment.

[4] During July 2006 the complainant's mother caused the complainant to be examined by a nurse at the local clinic, Ms Cecilia Mogadile. This was as a result of a suspicion held by the mother that the appellant had had sexual intercourse with the complainant. Before taking the complainant to the clinic the complainant's mother confronted her with her suspicions. The complainant responded by crying. At the clinic the nurse confirmed that the complainant had been sexually penetrated. On examining the complainant's private parts, the nurse found a number of scars indicating past penetration. At first the complainant refused to divulge the identity of the perpetrator and continued to cry. But after the nurse instructed the mother to leave the consulting room, the complainant told the nurse that the appellant had had sexual intercourse with her.

[5] Following the examination by the nurse, the complainant was taken to the police and thereafter, for medical examination by a local doctor, Dr Gunaselva. The doctor also observed the scars on the complainant's private parts and concluded that they were consistent with the history of 'sexual assault with penetration' which had been given to him.

[6] In essence, the complainant's evidence was that the appellant had sexual intercourse with her on a February morning after he had picked her up from the usual spot en route to collect the other children on their way to school. Whilst she was sitting on the front seat of the appellant's van, the appellant asked to have sexual intercourse with her. Thereafter the appellant pulled her towards him. They alighted from the front and got into the back of the van where the appellant had sexual intercourse with her despite her refusal. During July 2006 the appellant came to her house and ask to have sexual intercourse with her, but she refused.

[7] The appellant's mother testified that her suspicions about the appellant's behaviour started in about March 2006, when the appellant told her to stop paying

him for the complainant's transport. Some time thereafter the appellant visited the complainant's home and requested that the complainant should go and report to her maternal grandfather that 'they' would not be able to go to church. On this occasion, the appellant offered to lend the complainant a television set. He discouraged the complainant's mother from telling her husband about the television offer, saying he was lending it to the complainant and not the family. He brought the television to the complainant's home some days later. The complainant's mother discussed with the appellant's wife the appellant's waiver of transport fees and lending the complainant a television set. In July of the same year the complainant visited her mother's parents. Whilst there, she was sent by her grandmother to her home to ask for food. However, the complainant's mother was visiting elsewhere and had left the house keys at the appellant's home. The complainant fetched the keys on the mother's telephonic instructions and went home. On her return, the complainant's mother was told by a neighbour, Ms Tjulu, that the appellant had visited the complainant whilst the mother was away. This is the incident that led to the complainant being taken to the clinic. The mother's evidence was that on learning about the appellant's visit to her home in her absence, she again went to discuss her discomfort with the appellant's wife who suggested that the complainant be taken to the clinic.

[8] Ms Jeanette Mento previously worked at a crèche run by the appellant's wife at the appellant's home. She confirmed that she was present at the complainant's home when the appellant brought the television set for the complainant. The evidence of the nurse, Ms Mogadile was that she examined the complainant on 18 July and observed healed scars on her private parts. Dr Gunaselva testified on the contents of the J88 medico legal report which he completed on his examination of the complainant.

[9] The appellant denied ever having had sexual intercourse with the complainant. His evidence was that, contrary to the evidence of the complainant and her mother, the complainant would always be the last one to be fetched by him before going off to school. No sexual intercourse could have taken place in those circumstances. Regarding payment for the complainant's transport he testified that the complainant's mother 'was not paying (him)'. When he confronted her about her failure to pay her response was that in future the complainant would only use the

transport in winter. The appellant then offered to take the complainant to school even when the mother would not be paying. He denied that he had lent the television set to the complainant specifically. According to him he allowed the complainant's family to use it together with a wardrobe and a coal stove which were in the house that they were renting from his in-laws. He explained that his visit to the complainant's home in the mother's absence was to inspect the house for maintenance purposes as he had always done, on behalf of his 'in-laws'.

[10] Mr Clifford Moepeng testified that in 2006 he used to share transport to and from school with the complainant. According to him the appellant's routine when fetching the children was always to fetch two other children first, P and M, from Rooiwal, then himself, and only thereafter, the complainant, then they would proceed to school. The State also led the evidence of police officer Mr Ernest Monname who recorded the complainant's police statement. Mr Monname testified in relation to the spot or place where the sexual intercourse took place in the appellant's van. His evidence was that the complainant had told him this took place on the front seat of the van.

[11] In convicting the appellant the magistrate acknowledged the discrepancies in the evidence tendered by the State, particularly the contradictions in the evidence of the complainant, her mother and Dr Gunaselva. But he was satisfied that the evidence led constituted proof beyond reasonable doubt that the appellant had had sexual intercourse with the complainant.

[12] Before I consider the specific grounds on which the appeal is brought it is necessary to clarify the issues on appeal as I see them. Although, in the court a quo all the material elements of the charge against the appellant had to be proved, it does not appear that the evidence that the complainant had been sexually penetrated was in serious dispute. When Dr Gunaselva started giving evidence he was led by the prosecutor on the injuries and resultant scars on the complainant's private parts. The doctor had observed five scars on the complainant's genitalia. He had also observed and recorded in the medico legal report (J88) that the complainant's hymen was not intact. His conclusion, as recorded in the J88, was that the scars were 'compatible with remote sexual penetration'.

[13] Of course the doctor could not have authoritatively testified as to how, exactly, the complainant was penetrated. All he could do was to give an opinion as to his clinical findings and the history related to him by the complainant and his mother. Therefore his response to a question by the prosecutor as to whether it was his 'conclusion that there was sexual intercourse with penetration' must be understood in this context. His response was 'yes that is the possibility' and 'there are other possibilities too'.

[14] Clinical findings and conclusions drawn by doctors who examine complainants in sexual assault cases are generally accorded significant weight by our courts as an indication that sexual intercourse probably did or did not occur, particularly in relation to young children. The identity of the perpetrator then becomes determinable on its own merits. In this case there was never any evidence that the injuries on the complainant's private parts were caused by anything other than sexual intercourse. The finding by the magistrate that the evidence proved beyond reasonable doubt that the complainant was raped must be accepted to be correct. It is my view therefore that the pertinent issue in this appeal is the magistrate's finding that the appellant was the perpetrator.

[15] It was submitted on behalf of the appellant that the identification of the appellant by the complainant as the perpetrator probably resulted from her mother's suggestions in the course of confronting her at home and when giving history to the nurse at the clinic. The submission is also based on an entry in the J88 and the evidence by the doctor that the complainant and her mother told him that the complainant had been sexually abused by a relative. The entry in the J88 reads:
'2006 January to 7 June she was sexually abused by a known gentleman, a relative.'

[16] I agree that the complainant's evidence as to the identity of the perpetrator had to be considered carefully. She was a single witness who was a child. It is trite that in sexual assault cases caution must be exercised when considering evidence of young children who are prompted by leading questions on whether or by whom they were sexually assaulted. Immaturity might cause the child to believe that the suggestion is true.

[17] In her evidence, the complainant denied that she told the doctor that she was raped by a relative. The complainant's mother could not recall what her response to the doctor's question as to the identity of the culprit was. On the other hand, the doctor insisted that what he wrote was information given by the complainant and her mother. In my view the reference to a relative makes no sense in view of the fact that the complainant had already identified the appellant as the perpetrator to the nurse and to the police. The magistrate's finding that the reference to a relative was probably a misunderstanding between the doctor and the complainant and her mother is, in my view, correct. From the record it appears that the complainant's and the appellant's families were relatively closely associated. They attended the same church; the complainant's mother discussed her concerns about the appellant's behaviour with the appellant's wife more than once; and she left her home keys at the appellant's home when she went away. During cross examination both the complainant and her mother appeared to have intimate familiarity with the appellant's home circumstances; for example, they knew that the appellant's children had their own television set. Hence my view that a misunderstanding probably crept into their description of the perpetrator to the doctor; more so that there is no evidence that the discussion between the doctor, the complainant and her mother was conducted through an interpreter. Another patent example of a misunderstanding is the recordal by the doctor of the complainant's age as eight years. It is relevant that English is not the first language of the complainant, her mother and the doctor. Further, the person to whom the complainant first divulged the incident was a trained professional who calmed her down and coaxed her, not by focusing on the identity of the perpetrator, but by alerting her to dangers of sexually transmitted diseases and HIV.

[18] A further leg on which the appeal stands relates to the dates on which the incident happened. As stated, the charge was that the appellant raped the complainant during the period 1 to 28 February 2006.The examining doctor testified that he was told by the complainant and her mother that the rape occurred during the period February to 7 June 2006 as recorded on the J88. The submission on behalf of the appellant was that this uncertainty about the date of the incident was prejudicial to him and rendered his trial unfair. I do not agree. It is correct that a charge must set forth the relevant offence in such manner and with such detail as to be reasonably sufficient to inform the accused of the nature of the charge to enable an accused to

prepare his defence.[1] On the other hand, provision is made in the Criminal Procedure Act 51 of 1977 (CPA) for rectifying defective charges and clarifying any vagueness or ambiguity.[2]

[19] In this case the charge specified a clearly circumscribed period during which the offence was alleged to have occurred. The appellant was able to plead thereto without any difficulty. The reference, in the J88 and the evidence of the doctor, to the period February to June could only be a discrepancy in the evidence supporting the charge. Equally, the complainant's momentary failure during cross-examination to recall the month during which the incident occurred fell to be considered as such. These discrepancies could not, in my view, render the appellant's trial unfair.

[20] Regarding the complainant's evidence as to when the rape occurred, at the start of her evidence she was led by the prosecutor to 'explain what happened during the month of February 2006'. During cross-examination she was asked if she could remember the month during which the rape occurred. At first she could not, but she later did. Considering the age of the complainant, both at the time of the incident and when she was giving evidence, and the lapse of time between the incident and the trial, I do not think that her momentary lapse of memory was unreasonable or that it was an indication that she was fabricating her evidence. On the whole, apart from that moment in cross-examination the complainant was consistent about the month during which the rape occurred.

[21] A related submission was that on the doctor's evidence the incident could not have happened in February 2006. However the doctor's evidence that the only thing he could conclude with certainty from the injuries was that the incident occurred more than a month prior to the date of examination does not support that submission.

[22] Much was made, both before the regional court and in this court, of the lack of clarity in the complainant's police statement and her evidence in court regarding

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[1] Section 84 of the Criminal Procedure Act 51 of 1977. Also see s 35(3)*(a)* of the Constitution and *S v Ismail & others* 1993 (1) SACR 33 (D) 40*c-d.*

[2] For example, further particulars may be requested in terms of s 87 of the CPA.

where exactly, in the appellant's van, the sexual intercourse took place. As already stated, in her evidence the complainant stated that sexual intercourse took place at the back of the van. During cross-examination it was put to her that she had told Police Officer Monname that the incident happened on the front seat of the van. The relevant portion of the statement reads as follows:

'On his arrival as I was standing next to the electricity house I got into the van in front seat and I sat on passenger side and he pulled me next to him and undress my panty and he continue having sex with me without proposed any relationship to me and I do feel that his penis is into my vagina and he never used a condom and I did feel pain of what has happened to me as it was for the first time I have sex with a male person.'

[23] The complainant insisted during cross-examination that she had told the police officer that sexual intercourse happened at the back of the van. English is not Mr Monname's first language. During cross-examination he testified that the conversation between himself, the complainant and the complainant's mother was in Setswana. Although he insisted that he read the statement back to the complainant after taking it, the complainant denied that it was ever read back to her. As evident from the quoted portion, the statement did not result from a careful leading or guidance of the complainant to explain the details of the incident. Mr Monname admitted that the statement probably did not contain all the details of the incident. For these reasons its contents cannot bear the same weight in the same light as the complainant's evidence in court.[3]

[24] The complainant was criticized for failing to report the rape when the appellant was not in her presence and she was in the security of her home. But it hardly needs to be said that the effect of the threat which she said the appellant had uttered to her would not have ceased just because she was home. It is a well-established fact that even adult victims of sexual abuse often delay or do not report the rape or sexual assault, either because of threats uttered to them by the perpetrators or for fear of the social stigma, shame and humiliation of having been raped.[4] Naturally these emotions would have been heightened in the case of the complainant who was a

[3] *S v Mafaladiso en andere* 2003 (1) SACR 583 (SCA) at 593*a* – 594*h.*
[4] *Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive?* Patricia L Fanflik; 2007; Special Topics Series; Office of Violence Against Women;: office of Justice Programs; United States Department of Justice

child at the time. The conduct of the complainant in this case was consistent with recognised behaviour of victims of sexual abuse. For some time she hid the fact that she had been sexually abused. In court she was reluctant to give details about the incident. She resolved not to tell her mother about it even when the mother confronted her. In the J88 the doctor recorded that the complainant was agitated at the time of examination. The complainant's fear must have been compounded by the fact that the appellant was a close friend of her family and to an extent, a person *in loco parentis* over her. In her evidence she repeatedly stated that she was scared of him. The circumstances in which the complainant found herself were complicated and must have been overwhelming for a 12 year old. It would be unreasonable to expect that her fear would dissipate when she was in the presence of her parents.

[25] A further submission relates to the evidence of the complainant and that of her mother as to whether the complainant bled as a result of the sexual encounter and whether she or her mother washed her soiled underwear. It was the complainant's evidence that she bled as a result of sexual intercourse with the appellant. She further testified that she washed her soiled underwear as she used to wash her underwear at the time. Contrary to her evidence, her mother, during cross-examination, testified that she was the one who used to wash the complainant's panties at the time of the incident and she never observed any blood thereon. This contradiction, it was submitted on behalf of the appellant, was material and was an indication that the complainant's evidence that she was raped by the appellant was untrustworthy. But again, the issue whether the complainant bled is really relevant in relation to whether she was penetrated. As I have stated, proof beyond reasonable doubt of penetration is found in the medical evidence tendered. The complainant was 12 years old when she was penetrated. The probabilities favour her evidence that she bled on being penetrated. As to the discrepancy between her evidence and that of her mother on this aspect her evidence would be more reliable than her mothers. The magistrate remarked that the mother came across as 'a very unsophisticated person who did not appear to have a good memory'. He remarked that her powers of recollection were at times poor, but she readily conceded forgetfulness.

[26] Other contradictions in the evidence of the complainant pertain to whether the complainant undressed herself or the appellant did and whether the threat to kill her (if she told anyone about the incident) was uttered before or after the sexual intercourse. Regarding the first, at some stage during cross-examination she testified that the appellant undressed her before having sexual intercourse with her. She later said she undressed herself. When she was confronted about the contradiction she explained that she 'forgot'. On the second issue, when she was first asked why she did not resist she responded that the appellant had threatened to kill her with a firearm. Later, when asked when, exactly, the threat was uttered she responded that it was after the sexual intercourse. Thereafter she repeated that the threat came after sexual intercourse.

[27] The remarks made by the magistrate on the demeanour of the complainant and her mother are relevant. He referred to the complainant's immaturity at the time of the incident and at the time of the trial. This, according to him, 'emerged from the manner in which she explained the events'. It is my view that her capacity to understand and respond to questions must be considered in light of her progression only up to Grade 5 at the age of 15 years at the time of the trial. According to the magistrate the complainant had to be prodded to explain what happened. She was reluctant to give details of the incident without being asked specific questions. She 'just wanted to quickly explain the rape only'. The record reveals that she broke down twice whilst giving evidence. The magistrate formed the view that the complainant exhibited genuine emotions and answered questions 'very spontaneously'. He found, however, that despite spending an extended period of time in the witness stand, the complainant did not appear to exaggerate the incident; instead she testified in a 'very simple manner'.

[28] I agree with his finding that despite the shortcomings in the evidence of the complainant and her mother their evidence bears features of originality and trustworthiness. For example, they both insisted that the appellant's routine was to fetch the complainant first and thereafter the other children. Their spontaneous admission that at their home there was also a wadrobe and a stove that belonged to the owners of the house as the appellant stated, while insisting that the appellant specifically lent the television set to the complainant is significant. But their evidence

was not the same on everything. The complainant readily admitted that she had no knowledge about arrangements between her parents and the appellant regarding the inspection of the house. She did not know the exact details regarding the payment arrangements that her mother and the appellant had testified on. When asked if the appellant had given her presents she replied that he had only lent her a television set. Her mother readily admitted that the appellant had connected power to their house and had once fixed a broken window. She also readily admitted that the nurse's opinion was that the complainant had had sexual intercourse more than once. When it was put to her that the appellant would deny ever threatening the complainant she replied: 'I do not know because it was just the two of them in the vehicle [the complainant] is the one who can tell what happened. Her spontaneous estimate of March as the time when the appellant told her to stop payment is consistent with the sequence of the relevant events. It was not in dispute that she discussed the unusual favours extended by the appellant with the appellant's wife even before the visit that led to the complainant being taken to the clinic.

[29] Indeed, at first glance the evidence of the appellant and his witness Mr Moepeng appears clean and not as afflicted by shortcomings as that of the complainant and her mother. That, in my view, is because the appellant's defence was a bare denial. The only detail was in the order of picking up the children. Naturally that would limit the extent to which he and his witness would make mistakes. But even then his evidence was not without inconsistencies and obvious lies.

[30] Firstly, his explanation for the favours he extended to the complainant was not reasonably possibly true. Regarding payment for the school transport, according to him he confronted the complainant's mother because she had failed to pay him. But when the mother sought to withdraw the complainant from the transport arrangement he insisted that the complainant should continue travelling with him even though the mother was not paying. The explanation does not make sense. The evidence of the complainant and her mother about the television set was confirmed by Ms Mento who was not only an independent witness but the appellant's former employee. The appellant's evidence on this aspect was false beyond reasonable doubt. And there can be no reasonable doubt that these favours were designed to secure the

complainant's silence about the incident. Regarding his visit to the complainant's home he explained that he went there for routine inspection of the house. This was on a Saturday. On his own evidence it was only the third time he was visiting the house (the first and the second instance must be when he connected the power and fixed the window). Coincidentally he chose the third day of maintenance to be a Saturday when the complainant was alone at home. The probabilities favour the complainant's version on this aspect as well.

[31] It was put to the complainant that on that day the appellant found her in the company of 'Ntulu or Makazulu', a person who the complainant insisted she did not know. In cross-examination nothing was said to the complainant's mother about 'Ntulu or Makazulu'. Instead, in his evidence the appellant testified that he found the complainant in the company of Nangomeso. In my view Ntulu, Makazulu and Nagomeso were a fabrication designed to justify the appellant's abnormal visit to the 12 year old complainant.

[32] It was put to the complainant during cross examination that the appellant's routine was to first pick up G and her sister from Rooiwal. The appellant's evidence was that he would pick up 'the witness, P and his sister'. Thereafter he would drive back to Mogareng Village to pick up O and lastly the complainant. O's evidence was that the appellant first fetched P and M. It is also striking that O was only alerted in 2010 that he would have to testify at the trial, he could clearly recall that P, M and himself never missed a day of school in 2006, but he could not recall whether the complainant did miss some days at school.

[33] Consequently, I agree that when all the evidence is considered there is no reasonable doubt that the appellant did have sexual intercourse with the 12 year old complainant. I would have dismissed the appeal.

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N Dambuza
Judge of Appeal

Navsa JA (Cachalia and Tshiqi JJA concurring)

[34] I have had the benefit of reading the judgment of Dambuza JA and regret that I cannot agree with her reasoning and conclusion that the appeal against conviction should be dismissed. I shall in due course set out the relevant parts of the evidence I consider material.

[35] At the outset, it is necessary to record that persons, especially children, who allege that they were the victims of a sexual offence, should be treated with care and consideration from the commencement of an investigation by the police and through the rigours of a trial. In *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* [2009] ZACC 8; 2009 (4) SA 222 (CC), the Constitutional Court said the following (para 74):

'Courts are now obliged to give consideration to the effect that their decisions will have on the rights and interests of the child. The legal and judicial process must always be child-sensitive.' (footnotes omitted.)

[36] Furthermore, in *S v Jackson* [1998] ZASCA 13; 1998 (1) SACR 470 (SCA), this court held (at 476e-f) that the cautionary rule in sexual assault cases is based on an irrational and outdated perception. It unjustly stereotypes complainants in sexual assault cases as particularly unreliable. It went on to say the following at 476e-g:

'In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt – no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.'

[37] However, in the adjudication process, sight should not be lost of the fundamental principle of our law, that in a criminal trial the burden of proof rests on the prosecution to prove the accused's guilt beyond a reasonable doubt. [5] Not one of the principles set out in this and the preceding paragraphs can be sacrificed. One must necessarily guard against being too readily critical of child witnesses and, at the same time, avoid too readily excusing material shortcomings in the State's case.

[5] See P J Schwikkard *et al Principles of Evidence* 3 ed (2009) at 558-559 for a useful, brief discussion for the underlying philosophy. See also s 35(3)(*h*) of the Constitution which sets out the presumption of innocence.

[38] The charge sheet noted that the complainant was 12 years' old. It is important to note that the child complainant commenced her testimony without resort to an intermediary, in terms of s 170A of the CPA. It was only when she began to cry, shortly after she had started testifying, that the State considered the use of an intermediary. The magistrate recorded that an intermediary would be used because it was clear during the complainant's testimony that she was suffering and she was emotional and could not manage. Having regard to the history of the matter and the evidence available to the State, which is set out in the judgment by my learned colleague, it ought to have been clear that the complainant would require the assistance of an intermediary right from the commencement of her testimony. In this regard the State failed her.

[39] The charge sheet stated that the offence in question occurred 'upon or about' 1 – 28 February 2006. At the commencement of her evidence the complainant had no doubt that the rape about which she complained had occurred during February 2006. Under cross-examination the complainant was asked whether she could remember the month during which the alleged offence had occurred. This time her answer was: 'I do not remember.' When she was asked further why she had previously (at the commencement of her evidence in-chief), agreed that the offence had occurred in February, she replied that she had been scared. When asked where the prosecutor had obtained February 2006 as the date during which the incident occurred, she replied that he had obtained it from her. When asked why she could not now remember the date, she replied that the incident had occurred a long time ago. A short while thereafter she was once again certain that the offence occurred during February 2006, saying the following:

'I just remembered the date, I just remembered it.'

[40] The official form completed by Dr Gunaselva who examined the complainant and who testified on behalf of the State recorded that he had been told that she had been sexually abused between 'January to June 2006'. The complainant insisted that she had not told the doctor that the incident had occurred between January to June 2006. She was equally unyielding when she stated that she had not told the doctor that a relative had sexually abused her. He explained that the dates he recorded as the time during which the incident occurred were supplied by the

complainant's mother. The nurse, who testified in support of the State's case, stated that she had asked both the complainant and her mother about the date on which the rape had occurred and they said that they did not know. It must be borne in mind that the nurse saw the complainant and her mother during July 2006, much closer to the date of the alleged incident. The trial appears to have been conducted between August 2008 and the first half of 2011. A further unsettling feature of the complainant's testimony in relation to the time during which the incident is alleged to have occurred is that when she was asked how early in the morning it had happened, she said: 'I do not remember'. She also said that there was no one on the streets. One would have expected the obvious answer to be the time during which the complainant was usually fetched to be taken to school.

[41] What is set out above is a varied date span across which the appellant had to conduct his defence without an amendment having been made to the charge sheet in terms of s 86(1) of the CPA. Furthermore, no thought was given to s 92(2) of the CPA which deals with time variances between the charge sheet and the evidence. Section 92(2)*(a)* raises the question of prejudice that might be suffered by an accused. With reference to the above it cannot, in my view, be said that 'on the whole' the complainant was consistent about when the incident occurred. Given the inconsistencies, I fail to see how it can be said that the time period within which the offence was committed was 'clearly circumscribed'. It becomes even more inconsistent when one compares the complainant's evidence to the testimony of the doctor and the nurse. It cannot simply be excused on the basis that there was a 'momentary lapse' on the part of the complainant. The problems surrounding the date of the occurrence of the event are but one aspect to be taken into account in the assessment of the complainant's credibility.

[42] It is important to consider a little more closely the circumstances leading up to the complainant's identification of the appellant as the person who had raped her. The complainant testified that, until her mother took her to the clinic, she had not reported the rape to anyone. Her mother's motivation for taking her to the clinic so that she could be examined was the report by the neighbour that the appellant had visited the child at the house in her absence. As set out in the judgment of Dambuza JA, that incident was connected by the complainant's mother to the prior gift of the

television set as well as to the waiver by the appellant of the complainant's transport fees.

[43] The evidence of the nurse, who saw the complainant at the clinic, was that the latter's mother had brought her to the clinic saying that she suspected that 'a certain man', who transported her child to school, had raped her daughter. She provided bases for the suspicion. This communication took place in the presence of the complainant. All the while the complainant was crying. The complainant's mother informed the nurse that she had put her suspicions to her child but that she had not been forthcoming. According to the nurse the mother informed her that the child just kept on crying without divulging anything. It was only after the mother was requested to allow the nurse to question the child alone that the complainant then informed her that the appellant had raped her in the back of the van which he used to transport her to school. It is necessary to take into account that, under cross-examination, the nurse testified that she gained the impression that the child was uncomfortable with her mother in attendance because she was 'continuously crying'. From the nurse's examination of the complainant's vagina she concluded that there had been penetration.

[44] The fact that the complainant's mother, in her presence, had informed the nurse about the circumstances giving rise to her suspicions and her simultaneous identification of the appellant as the person she suspected of having raped her child, is not without significance in the overall assessment of whether the State had met the onus of proving the appellant's guilt beyond a reasonable doubt. It will be recalled that, according to the nurse the complainant was uncomfortable in her mother's presence. In addition her mother had already subjected her to an interrogation and pressure. Even though the complainant's mother left the room before the complainant then provided the nurse with a description of events, the power of suggestion by her mother cannot be discounted.

[45] Under cross-examination the appellant's legal representative sought to explore whether the complainant understood what the word 'relative' meant. She replied she understood the word to mean that it was a family member who was 'not very close'. The complainant was adamant that the appellant did not qualify as a

'relative'. Dr Gunaselva who was called by the State was 'absolutely sure' that the complainant and her mother had told him that the perpetrator was a relative. The contradictions between State witnesses about whether a 'relative' was identified as the perpetrator cannot in my view simply be ignored on an assumption that a 'misunderstanding probably crept in'. There was no evidence of a misunderstanding. The contrary is true. Dr Gunaselva was absolutely certain that this had been imparted to him by both the complainant and her mother. The complainant, even though she understood the word 'relative' a little more restrictively than its actual meaning, nevertheless was clear that the appellant was not her relative. This is yet another unsatisfactory aspect of the State's case. It bears mentioning that Dr Gunaselva's evidence did not prove conclusively that the complainant had been raped, only that this was possible.

[46] There are further material inconsistencies and contradictions that impact on the strength of the State's case. Under cross-examination the complainant was quite clear that she was raped at the back of the bakkie. She explained how she had been taken from the passenger cab to the rear of the vehicle where the appellant had undressed her. The complainant was then confronted with the statement she made to the police, in which the following appears:

'I [got] into his van in front seat and I sat on passenger's side and he pulled me next to him. And undressed my panty and he continued having sex with me without proposing any relationship with me.'

The complainant testified that when she made the statement she had spoken to the policeman in Setswana and that the policeman was Setswana speaking. Her response to the apparent contradiction between her evidence in court and the statement she made to the police was to insist that she had told the police what she had told the court.

[47] After her earlier testimony that the appellant had undressed her, as set out in the preceding paragraph, the complainant testified that she had undressed herself. Confronted with this contradiction, she said that her earlier statement in court had been a mistake and that she had forgotten what had in fact occurred.

[48] The reliance on *Mafaladiso* is not an adequate answer to the contradictions between the complainant's statement to the police and her evidence in court. Those contradictions, as pointed out above, were in fact compounded by contradictions in her *viva voce* evidence. First, the passage in *Mafaladiso* indicates that it must be carefully ascertained what the witness had intended to say on each occasion. In the present case there is no ambiguity in each of the contradictory statements. Second, *Mafaladiso* states that regard should be had to language and cultural differences between the witness and the policeman taking the statement. In the present case, both the policeman and the complainant spoke Setswana.

[49] The policeman, Mr Ernest Monname, testified that he had almost two decades of experience as a policeman. According to him the complainant's mother was present when he took the former's statement. He was adamant that he had read it back to her and that she confirmed that she had understood the contents. He expressed no doubt that the complainant told him that she had been raped within the passenger cab of the vehicle. She had told him that she was the first to be picked up and that she had occupied the front seat. He was also certain that she had told him that the appellant had undressed her. Under cross-examination by the prosecutor who suggested to him that he might have misunderstood the complainant, he said the following:

'I do not understand, because she said to me she was in the front seat. She was pulled by the accused towards him and the rape occurred.'

Notwithstanding the prosecutor's persistence the witness insisted:

'That is how I recorded it, and that is how it was related to me.'

In the light of what is recorded above, the inconsistencies and contradictions cannot be explained away simply on the basis that the policeman admitted that the statement probably did not contain all the details of the incident. We are not dealing with omitted details, but factual averments in the statements that are inconsistent with the subsequent testimony of the complainant and with contradictions in her *viva voce* evidence.

[50] It is not insignificant that the complainant testified that before the appellant had raped her he had threatened to kill her if she told anyone about the deed he was about to perpetrate. This has to be contrasted with the visit to her house in respect of

which she testified that she had refused to have sexual intercourse with him. It does not explain her apparent fear whilst in a public place as against her being resolute when she was on her own in her mother's house. The complainant described the place where the appellant parked the bakkie and raped her as being close to the container at which they sold electricity. It appears from the complainant's evidence under cross-examination that the location at which she was raped was also the location at which she boarded the motor vehicle in order to be transported to school. The complainant's mother, in insisting that the complainant was the first to be collected on the transport route, testified that she sometimes saw the appellant collecting her child at a spot close to her house. It does seem strange that the appellant would have chosen a visible spot at which to perpetrate the rape.

[51] It is important to consider the complainant's testimony that she had bled as a result of being raped and that as a result there was blood on her panties. The complainant's mother testified that she used to wash the complainant's panties and that she had not observed any blood on her daughter's underwear. The complainant, on the other hand, said that she used to wash her own panties. This contradiction is material and cannot be explained away simply on the basis that the bleeding was only relevant in relation to whether the complainant was penetrated and that this aspect had been put beyond doubt by the medical evidence, which I have said is neutral. The absence or presence of blood on the panties is material and is relevant in relation to credibility. It is also no answer to say that on this aspect the appellant's evidence should be preferred above that of her mother.

[52] The regional magistrate, whilst ostensibly recognising that a witnesses' demeanour is not an infallible guide to the truth, nevertheless placed great store on the complainant's demeanour. In the past, counsel representing accused were often apprehensive about findings on demeanour that were intended as a shield against appeals. In *President of the Republic of South Africa & others v South African Rugby Football Union & others* [1999] ZACC 11; 2000 (1) SA 1 (CC), the Constitutional Court, said the following (para 79):

'The advantages which the trial court enjoys should not, therefore, be over-emphasised "lest the appellant's right of appeal becomes illusory". The truthfulness or untruthfulness of a witness can rarely be determined by demeanour alone without regard to other factors

including, especially, the probabilities . . . A further and closely related danger is the implicit assumption, in deferring to the trier of fact's findings on demeanour, that all triers of fact have the ability to interpret correctly the behaviour of a witness, notwithstanding that the witness may be of a different culture, class, race or gender and someone whose life experience differs fundamentally from that of the trier of fact.' (footnotes omitted.)

[53] Almost a century ago, this court, in *Estate Kaluza v Braeuer* 1926 AD 243 at 266-267 said the following:

'A crafty witness may simulate an honest demeanour and the Judge has often but little before him to enable him to penetrate the armour of a witness who tells a plausible story.'

In *S v Kelly* 1980 (3) SA 301 (A) at 308D-E, in considering that passage, stated:

'On the other hand an honest witness may be shy or nervous by nature, and in the witness-box show such hesitation and discomfort as to lead the court into concluding, wrongly, that he is not a truthful person.'

The magistrates' observation on assessment of the complainant in the witness-box is no substitute for an assessment of the totality of the evidence including the merits and demerits of the State's case.

[54] My colleague, although accepting that at least on the face of the evidence of the appellant and the witness, Mr Moepeng, does not appear to be 'afflicted by shortcomings' such as those in relation to the complainant and her mother sought to explain that by stating that it was easy for them to avoid being seen as inconsistent and contradictory because the complainant's version of events was a bare denial. Mr Moepeng, who testified about the route that was followed on the way to school, is criticised by my colleague on the basis that whilst he purported to recall that during 2006 he had not missed a single day of school whilst he could not say with the same degree of certainty that the complainant had also been present every day. I am unable to see that as a proper basis for the rejection of his evidence. In *S v Van der Meyden* 1991 (1) SACR 447 (WLD), the court said the following at 449j-450b:

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

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

Other than the statement that it should be expected that the appellant and his witness would show no discernable discomfort in their testimony because the appellant's version is one of a bare denial of the facts alleged by the State, no sustainable basis is provided for rejecting their evidence.

[55] Dambuza JA considered the three incidents upon which the complainant's mother based her suspicions to be well-founded. It will be recalled that the complainant's version in relation to each of these incidents cannot without more simply be rejected.

[56] In any event the incidents in question are all circumstantial evidence in respect of which one should have regard to what was stated in the oft quoted passage *R v Blom* 1939 AD 188 at 202-203:

'In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'

[57] Even if one were to discount entirely the evidence of the appellant in respect of the three incidents, which in the present case one cannot do readily, the incidents in themselves do not lead to the ineluctable conclusion that the appellant was guilty of the offence with which he had been charged.

[58] I am willing to accept that one or two shortcomings in the evidence of the complainant might be expected and forgiven. However, the lengthy catalogue of materially unsatisfactory aspects referred to above must redound to the benefit of the complainant. They cannot be replaced with the catalogue of excuses. In my view, for all the stated reasons, it follows that the State failed to prove its case beyond a

reasonable doubt. The appeal ought to succeed and the conviction and related sentence should be set aside.

[59] The following order is made:

The following order is made:

The appeal is upheld and the order of the court below is set aside and substituted with the following:

‘The appeal is upheld and the conviction and related sentences are set aside.’

_____
M S Navsa
Judge of Appeal

APPEARANCES:

For the Appellant:	N L Skibi Instructed by: Legal Aid South Africa, Mahikeng Bloemfontein Justice Centre, Bloemfontein
For the Respondent:	N J Carpenter and D G Jacobs Instructed by: Director of Public Prosecutions North West Director of Public Prosecutions, Bloemfontein